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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 343.

ELIZ. S. DOULTER, et al., - - - - - - Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

BRIEF FOR APPELLEE.

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Supreme Court of the United States.

GUS G. COULTER, ETC., ... *Appellants*,

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Appellee.*

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Kentucky, perpetuating an injunction against appellants in their respective capacities of auditor, treasurer and secretary of State, together constituting the Board of Valuation and Assessment for said State, enjoining them and each of them from collecting or taking any steps for the collection of a certain part of an assessment made against appellee.

Under the Statutes of Kentucky the *tangible* property of railroad companies is assessed by a Board of Railroad Commissioners. (The statute so far as necessary to consider providing for this assessment is on pages 15 and 16 of appendix.) After that assessment is made another board, called the Board of Valuation and Assessment, fixes the *total* value of *all* the property of railroad companies; ascertains what proportion of the total value lies in Kentucky, and from that value deducts the valuation fixed by the Board of Railroad Commis-

sioners of the tangible property and sets down the remainder for taxation under the style and name of franchise tax. (The statute on this subject so far as it is important to be considered will be found in the appendix, at pages 1 to 6.)

The assessment of all property in Kentucky is required by the Constitution of the State to be at the "fair cash value, estimated at the price it would bring at a fair voluntary sale."

The property of all persons and corporations, except railroad companies and such other corporations as are assessed by the Board of Valuation and Assessment, is assessed in each county by the local assessor. While every assessor is required to assess property at its "fair cash value," they vary in the performance of that duty very much, but such assessments are rarely, if ever, made according to the statute. On the contrary, the percentage of the fair value taken by the various assessors differs very widely. In many counties, notwithstanding the strict statutory requirements, the assessments are below, in some instances very far below, fifty per cent. of the fair cash value, and in more than 90 per cent. of the counties the assessments are below 80 per cent. of the fair cash value. The record discloses that the assessments vary in the counties all the way from about 25 per cent. to 80 per cent. of the fair cash value. In some few of the counties there would appear to have been a higher assessment, if we judge by certain unreliable evidences hereafter to be mentioned. But there are very few of them.

In Kentucky we have always had strict statutory requirements, that property should be assessed at its full or fair value, but the assessors are elected by the people, and many years ago, as far back as 1884, the legislature seemed to realize that it was impossible to secure, by any laws however strict, a full assessment, and deeming that uniformity of burden was the most essential thing for a republican government to achieve,

adopted an act *the whole purpose* of which was to equalize the burdens of government as between the counties. To accomplish this, a board was created, called the Equalization Board, and it was directed to equalize the assessments as between the counties, but was forbidden to increase or decrease the aggregate assessment of the State. The board was not by the first or any subsequent act given any original power of assessment, nor any power to decrease or increase the aggregate assessment, but merely to equalize or properly distribute the burdens of government as between the counties, the county and not the individual being treated as the unit. A careful history of the legislation of the State in respect to equalizing assessments, is given in the opinion of the lower court.

The Board of Equalization has nothing to do with and takes no jurisdiction over assessments made by the railroad commissioners or the Board of Valuation and Assessment, but confines itself, and under the law is bound to confine itself, to assessments made by the county assessors.

COMPLAINT.

The appellee complains:

1. That complainant's property had been assessed by the Board of Valuation and Assessment at its *full* value. (Rec., 10.)

2. That all property assessed by the various county assessors had been uniformly and intentionally assessed at not over 80 per cent. of its fair cash value, but, on the other hand, much of it had been assessed far below 80 per cent. of its fair cash value.

3. That the Board of Equalization, in regular session, had undertaken to equalize, or, rather, had given out that it

would equalize, the assessments coming under its jurisdiction, at 80 per cent. of its fair cash value, but, in fact, had equalized such assessments at not over 70 per cent. of the fair cash value. (Rec., 5 and 6.) That thereby an unjust discrimination had been made against the complainant, in that it would be required, if the assessment against it should stand, to pay taxes on the full value of its property, when the great mass of property in this State would be required to pay taxes on not over 80 per cent. of its fair cash value, contrary to the guaranty of equal protection of the laws given by the Fourteenth Amendment of the Federal Constitution. And the prayer is that the appellants and each of them be enjoined from collecting or attempting to collect taxes based on so much of the assessment as is in excess of 80 per cent. of the aforesaid valuation. The tax due the State, based on an 80 per cent. valuation, was paid into the treasury. The tax due the various counties, cities, towns and taxing districts could not be ascertained nor paid nor tendered, because there had been no apportionment of the aggregate value, as required by law, among these political subdivisions.

It is alleged in the bill that the Board of Valuation and Assessment had made a tentative assessment of complainant's property at its full value, and would, unless enjoined, make said assessment final. It is further alleged that the road of complainant passes into, or through, fifty-four counties in the State, and that, under the statute, it would become the duty of the board to apportion the aggregate assessment made among the various counties into or through which the road passes, and of the auditor to certify to the various County Court clerks the value thus apportioned to their respective counties, and thereupon each of said counties, and each city, town or taxing district therein would be claiming and seek-

ing to collect the tax claimed to be due by each on the value of so much of appellee's road as lies within their respective boundaries, and the court was asked to enjoin the board from apportioning said assessment among the counties, and the auditor from certifying any such apportionment to the various county clerks, or any of them.

The answer put in issue substantially all the averments of the bill. The case was carefully and fully prepared, and the lower court, after the most painstaking and elaborate consideration of all the evidence, delivered its opinion (Rec., 789 to 822 inc.), finding the following facts and conclusions:

1. That the property of complainant had been assessed at its *full* value. (Rec., 788, 813, 818.)

2. That the great mass of property in the State primarily assessed by the local assessor, and subject to equalization, amounting to over 77 per cent. of the total value of the property in the State, had been "*systematically, habitually and intentionally undervalued to at least the extent of 20 per cent. for the year 1902, first by the local assessing officials, and then by the equalizers. Not only this, but the legislature of the State, by its latest expression on the subject, provided that it should be undervalued as much as 30 per cent. by the equalizers.*" (Rec., 788, 791, 818, 820.)

3. That property thus undervalued and subject to equalization is of a value of $534,417,279, while the property not subject to equalization, including the railroad property, is of a total value of only $64,412,534.

The court, having reached these conclusions, determined that the complainant had not been given the equal protection of the laws guaranteed by the Fourteenth Amendment, and that the only way in which the wrong could be redressed was to enjoin the appellants "from in any way enforcing, or attempting to enforce, or collect the taxes on the franchise

assessment, made by them, of the complainant, for the year 1902, on any amount or value exceeding the sum of $4,017,154.66," that being on a basis of 80 per cent. of the value fixed by the appellants.

From that judgment this appeal is prosecuted.

ARGUMENT.

The appellants make several technical points, which we shall consider before proceeding to a discussion of the merits.

1. They insisted in the court below, and insist here, that there is no equity in the bill, because the amounts conceded to be due to the various counties and municipalities therein were not tendered before filing the bill.

2. They insist here, for the first time, that the jurisdictional amount is not properly stated in the bill.

3. They insist that the averments as to valuation are insufficient.

To the first contention there are two answers, both of which, we submit, are conclusive:

(a) In the first place, the complainant did not, at the time of the bringing of this suit, admit that anything was due to the counties, cities and taxing districts. On the contrary, that matter was then in litigation in the Court of Appeals. The court below, in passing upon this point, falls into an error of fact. Referring to the case in which that question was being litigated, viz., Southern Railway in Kentucky vs. Coulter, 68 S. W. 873, the court said: "This case, however, was decided by the Court of Appeals June 10, 1902, which was before the bringing of this suit." But the court was evidently not aware of the fact that the litigation was still

pending, and the opinion suspended on a petition for rehearing, which was not overruled until the 12th day of November, 1902, as shown by the order of the Court of Appeals overruling it, a duly certified copy of which we have, and which reads as follows:

KENTUCKY COURT OF APPEALS.
SEPTEMBER TERM, NOVEMBER 12, 1902.

Southern Railway Company, etc.,

vs.

Coulter, Auditor, etc., Franklin.

Court being sufficiently advised, the petitions for rehearing herein are overruled.

In that case the question was distinctly raised whether under Section 4081 the valuation found as the franchise valuation could be apportioned to the counties and localities until after the tangible property in each county and in each local district was ascertained and deducted. The Board of Valuation and Assessment had up to that time refused to certify the assessment to the counties and local districts, except where there was something remaining after deducting from the franchise assessment applicable to the tax district the tangible property in the district. Shortly before the action of the Southern Railway Company and other railroad companies against Coulter, the auditor, was instituted, the county attorneys throughout the State appeared before the Board of Valuation and Assessment and urged it to certify the assessment for five or six years to the counties without making any such deduction of tangible property in the several local districts. The board, after several protracted arguments lasting a number of days, concluded it would do so, and then

the suit was brought to enjoin them from certifying, which resulted in a decision of the court below against the railroad companies, and on appeal two of the judges of the Court of Appeals dissented from the opinion of the court. The original opinion was rendered June 10, 1902, but time was extended until the September term to file a petition for rehearing, and at that time it was filed, and was not overruled until the 12th day of November, 1902, so that the court below simply failed to remember, when it wrote the opinion, that the controversy was still pending in the Court of Appeals at the time the suit was brought, on a petition for rehearing.

It seemed to us at the time that the statute was very plain, leaving out of view the practical construction of it, which had been continuous from the time it was put into effect. But we contended that the statute itself, in its very words and terms, was plain that there should be the deduction of the tangible property, in the counties and local districts, from the assessed value, which the statute directed should be certified to them. The language of the statute, italicized in the appendix, viz., "*less the value of any tangible property assessed or liable to assessment in any such county, city, town or taxing district*," we contended, showed this. Pending that contention, the legislature changed that section and left off the words just above quoted, and the Court of Appeals, we thought erroneously, concluded that the old section, and the new section with the words left off, were entitled to the same construction. That was the contention pending in the Court of Appeals, on a petition for rehearing, at the time this suit was brought, and, of course, the appellee would not be bound to tender the tax before bringing the suit under those conditions.

(b) In the second place, the Board of Valuation and Assessment had not made the apportionment among the counties

and local jurisdictions, and until that was done the assessment for the counties and subordinate jurisdictions was not completed, nor was the tax due until the auditor, thirty days after the apportionment, had certified to the counties, and to the cities, towns and taxing districts, the valuation in each district upon which the local rate could be applied, and the tax was not due until this certification was given by the county clerk to the local taxing officer, and that taxing officer had notified the appellee of the fact that he had the assessment in his hands and the amount due.

This is apparent from an examination of Sections 4077 and 4091, appearing in the appendix.

The law never requires a vain thing, and it would have been perfectly useless, even if the appellee might, by an independent investigation, have made a close approximation of the amounts due to the various local jurisdictions, to have made tenders of the amounts found to be due, because not one of the officers would have had the *legal right* to receive the money until the amount due had been certified down by the auditor to the county clerk, and by the latter certified to the collecting officer, and not one of them would have received the money, if tendered, and if any of them should have received the money before the certification, the payment would not have been a legal one; and if the officer had defaulted, his bondsmen would not have been liable, and the municipality for which he assumed to act would not have been concluded. It would have been like the payment of a judgment to the sheriff prior to the issuance of the execution, which is the sheriff's only warrant for the collection.

We submit that, on the facts of our case, it is not necessary that we should consider the various authorities cited by counsel to the effect that, before a suit can be brought to enjoin the collection of taxes, the amount admitted to be due should be tendered. We do not question that legal proposition.

2. As to the second point it is sufficient to quote from the bill. At the beginning of the bill it is said:

> "And thereupon your orator complains and says that "the amount in controversy herein, as will hereafter more "specifically appear, far exceeds the sum and value of "$2,000, exclusive of interest and costs." (Rec., 2.)

Again, on page 11, the bill proceeds:

> "The difference between the amount tendered and paid "by your orator and the amount of the tax on the tenta- "tive assessment, which will be made final, except as it be "restrained by this court, is $32,098.79, without consider- "ing the local taxes; and the amount involved herein, "therefore, far exceeds, exclusive of interest and costs, the "sum of $2,000."

Furthermore the bill shows, on pages 10 and 11, that the total valuation fixed by the Board of Valuation and Assessments of the property of the appellee in Kentucky was $33,788,724.50, from which it deducted $23,013,825, the assessed value of the tangible property, leaving as the franchise valuation $10,774,899.50, and that the State's tax on that amount at 50 cents on the $100 was $51,187.27. The bill also shows that the appellee's road passed into or through fifty-four counties in the State, and each county, and each city, town and taxing district therein, would have a claim for taxes on the property of the appellee. The total of these claims would, of course, be on the same valuation as that for the State, because the total value ascertained for taxation for State purposes is apportioned among the political subdivisions of the State, and each gets its share of the tax on

the value of the property lying within its territorial limits. To say, therefore, that there would not be the requisite amount involved, it would have to be assumed that the aggregate rate of taxation for the various counties, cities, towns and taxing districts was infinitesimally small, say less than three cents on the $100, or an average of $\frac{3}{64}$ of one cent on the hundred dollars to each county—so small that we think any court would judicially know that such a rate of taxation was never levied by any political subdivision of the State. Furthermore the court has this additional evidence in the case that, when the court below rendered its judgment, it, at the instance of these political subdivisions, required the appellee to give a bond, which would protect them in the amount due to them, and in making that investigation the court by its judgment (Rec., 789) required that the "complainant, within thirty days from the entry of this decree, execute before and to the clerk of this court, for the benefit of the counties, cities, towns and districts interested, a bond with one or more securities, to be approved by the clerk, in the sum of $30,000, conditioned that it will in the event of a reversal of this judgment, comply with any order that may be made, and if any further assessment or certification than that herein permitted shall be ordered, it will promptly pay the taxes so certified under such order." It is certainly not to be presumed that the lower court after investigation, would require a bond for $30,000, if the amount involved, so far as the political subdivisions were concerned, was less than $2,000, exclusive of interest and costs.

It is urged by appellants:

A. That the suit was not brought until after the final assessment, and after all the duties of the appellants in regard to the assessment, or the collection of the taxes thereon, had ceased, and, therefore, as to the State's portion of the tax, it

is a suit against the State, contrary to the Eleventh Amendment of the Federal Constitution.

B. That the court had no jurisdiction to entertain a suit against the State, and that there is no sufficient averment, relating exclusively to the counties and municipalities, showing jurisdictional amount.

A. Upon the first part of this contention counsel rely upon the case of Coulter vs. Weir, 127 Fed. 897, where, in a suit similar in some respects to the case at bar, and where, at the time the suit was instituted, the assessment had been made final, the court, after apparently examining the chapter on revenue and taxation, and Section 113, relating to the duties of the attorney general, said:

> "Counsel representing the appellee have not pointed "out any provision of law under which the defendant as "auditor had any power or authority to coerce the pay- "ment of the tax so assessed."

And the court concluded upon its own investigation that the auditor had nothing further to do in the matter after the final assessment. But we submit the court was in error in this respect. Section 114, in the chapter upon the duties of the attorney general, declares:

> "That he, *with the assistance of the auditor of public* "*accounts*, shall investigate the condition of all unsatisfied "claims, demands and judgments in favor of the Com- "monwealth, and take all necessary steps by motion, "action or otherwise, to collect or cause the same to "be collected, and pay them to the treasurer; and to this "end the auditor of public accounts may employ such

"assistance and attorneys in the various counties as may "be necessary to aid the attorney general in such investi- "gation or collection."

The duties enjoined upon the auditor by this section are not only important, but in some respects indispensable to the attorney general. The auditor must make out a statement of the assessment showing the valuation, the amount due, the amount that had been paid and is to be credited upon the assessment, and all other necessary details to enable the attorney general to frame the suit, and he must aid the attorney general in making the necessary investigation. Furthermore, he is given the power to employ other counsel, and any assistants that may be necessary to aid in the enforcement of the collection of the tax. In other words, he is the chief fiscal officer of the State, and is given, and has always exercised, a general supervision over the collection of State revenue. That he has done so can be easily seen from the very case relied on by counsel, for it will be seen that Mr. Ray, a private citizen, and not the attorney general, appeared for the State in the case of Weir vs. Coulter, *supra.* It can also be seen from the case of Louisville Trust Company vs. Stone, 107 Fed. Rep. 305, that McQuown, and not the attorney general, appeared in behalf of the State or the State's officers. That case was framed, and the object of it was the same as this case. Besides, Section 4104 makes it the express duty of the auditor to look after the collection of taxes, penalties and interest due the State *from railroad companies.* That section is as follows:

"Taxes, penalties and interest due the Commonwealth "from any *railroad company* may be recovered *by the* "*auditor of public accounts*, by action in the name of the "Commonwealth in the Franklin Circuit Court."

Furthermore, no money can be paid into the treasury except on the written authority of the auditor. Section 152 of the Kentucky Statutes provides:

> "He (meaning the auditor) shall grant written authority "to the treasurer to receive money from public officers "or other persons due to the Commonwealth, stating the "person, the amount to be paid in, and on what account "paid, and charge the same to the treasurer in an appro- "priate book under its proper head."

Of course, it is easy to be seen that it is very important to appellee to prevent the money, if it should be collected by any means, from going into the treasury of the State until after the final adjudication, because until it goes into the treasury it can be recovered back if the final adjudication should be favorable to appellee, whereas, if the money once gets into the treasury of the State, of course the appellee would be without remedy, even though its claim had been fully vindicated by this court.

For the same reason it was important to prevent the treasurer from *receiving the money* and placing it in the treasury of the State. The sections bearing on his duties are as follows (Secs. 4686 and 4695):

> "All public moneys and dues to the Commonwealth "shall be paid into the treasury upon the written permit "or authority of the auditor, as now or may hereafter be "provided by law, and the same, when paid to the treas- "urer, shall be by him, on the same day, deposited in one "of the State depositories designated as hereinafter pro- "vided; and all permits shall be filed and carefully pre- "served by the treasurer.

"The treasurer shall receive all money due or payable "to the Commonwealth from collectors of revenue, public "officers and others, when tendered, accompanied by the "permit of the auditor of public accounts, stating the "amount to be received, on what account, from whom to be "received, and in what to be paid. He shall immediately "make out a receipt for the amount received, and for "what, and of whom received, and in what same is paid, "and deliver it to the auditor, who shall in like manner "give a receipt to the officer or person paying the same. "The receipt, besides stating the amount paid, shall also, "if it be all that is due from the officer or other person, "so state."

This case is not controlled by Fitts vs. McGee, 172 U. S. 516. In that case the attorney general and solicitor were not charged with the enforcement of the unconstitutional statute. They were simply, as the law officers of the State, about to bring a suit in the name of the State. In this case the auditor is charged with the enforcement of the statute, and if he acts in the respects indicated by the sections quoted, he, as an individual, will under color of office do appellee a wrong, which, we submit, it is the duty of the court to enjoin. Again, we contend that if he should receive the money, under color of his office, he is really without legal right to receive it, and should be enjoined as an individual from, under color of his office, giving permit for the money to go into the State's treasury, and the treasurer, for the same reason, should be enjoined from receiving the money and depositing it in the State's depository to the credit of the State.

If our contention is well founded, then neither of these officers has the right under the law to collect or receive the amount in controversy, and their attempt to do so places them in the category of other State officers, acting under color of

office, which this court has in numerous cases held could be proceeded against.

We feel sure that, if the attention of the Circuit Court of Appeals had been called to those sections of the statute, it would have changed its opinion in the Weir case. Again, in that case there was an important feature not present in this case. The decree in that case "did not stop with an order commanding the defendant to take no other or further steps under the law, because he had no other or further duty in connection with the matter, but adjudicated the amount due under a legal assessment, and undertook to annul the assessment in excess of that sum. The court in this exceeded its jurisdiction, for jurisdiction over defendant did not give it jurisdiction over the State of Kentucky, as the decree seems to assume."

It is true, in this case the decree required the treasurer to execute a receipt in full of State taxes, but such a receipt, if executed, would not have concluded the State, and it was because of the realization of that fact that the decree in this respect was never executed, and the treasurer has never executed any such receipt. The decree in this case acted only upon the appellants, and did not purport to act on the State.

We submit, therefore, that this is no more a suit against the State than in any of the numerous instances in which this court has sustained such suits. See Osborn vs. Bank, 9 Wheat. 738; Cummings vs. Bank, 101 U. S. 153; U. S. vs. Lee, 106 U. S. 196; Poindexter vs. Greenhow, 114 U. S. 270; Allen vs. B. & O. R. R. Co., 114 U. S. 311; Pennoyer vs. McConnaughy, 140 U. S. 1; Regan vs. Trust Co., 154 U. S. 362; Scott vs. Donald, 165 U. S. 107; Smith vs. Ames, 169 U. S. 518; Farmers Bank vs. Stone, Auditor, 174 U. S. 409:

B. Upon the second part of appellants' contention, viz., that, because this is a suit against the Commonwealth, the

court had no jurisdiction *quoad* the State's portion of the claim, we submit that, assuming the premise, the conclusion is erroneous.

In the case of Osborn vs. Bank of U. S., 9 Wheat. 738, the court, through Chief Justice Marshall, said:

> "The State not being a party on the record, and the "court having jurisdiction over those who are parties on "the record, the true question is not one of jurisdiction, "but whether, in the exercise of its jurisdiction, the court "ought to make a decree against the defendants; whether "they are to be considered as having a real interest, or as "being only nominal parties."

This court, in the case of I. C. R. Co. vs. Adams, 180 U. S., where a similar question was involved, made the quotation we have just made, and in discussing the question there involved, said, on page 37:

> "The question whether this is a suit against the State "within the Eleventh Amendment to the Constitution, "which provides that the judicial power of the United "States shall not be construed to extend to suits against "one of the United States, by citizens of another State, "is also one which we think belongs to the merits, rather "than to the jurisdiction. If it were a suit directly "against the State by name, it would be so palpably in "violation of that amendment that the court would prob-"ably be justified in dismissing it upon motion; but the "suit is not against the State, but against Adams individ-"ually, and if the requisite diversity of citizenship exist, "or if the case arise under the Constitution or laws of the "United States, the question, whether he is so identified "with the State that he is exempt from prosecution on

"account of the matters set up in the particular bill, are "more properly the subject of demurrer or plea than of a "motion to dismiss. * * * It may be said, in a "certain sense, that the judicial power does not extend to "civil suits (at least if begun by capias) against members "of Congress or of the State legislatures, pending the "session; or against witnesses going to, attending or "returning from courts of justice; or against bankrupts "for causes for action arising before bankruptcy, and cov- "ered by the discharge; or against infants under their "general contracts; or against the owners of vessels who "have petitioned for a limitation of liability, but it was "never doubted that such power extended to an examina- "tion of the question whether the defendant was entitled "to the exemption of liability claimed by him, and in "passing upon this question the court necessarily assumed "jurisdiction of the cause. * * * But where the "suit is against an individual by name, and he desires to "plead an exemption by reason of his representative char- "acter, he does not raise a question of jurisdiction in its "proper sense. As already observed, this question depends "upon the language of the statute, although the word "'jurisdiction' is frequently and somewhat loosely used "to indicate the right of the plaintiff to sue, or the liabil- "ity of the defendant to be sued, in a particular case. To "put a familiar test: Can it be possible that if the plain- "tiff company were to succeed in this suit, the decree in "its favor could be attacked collaterally as null and void "for want of jurisdiction, by reason of the fact that the bill "failed to allege a compliance with the ninety-fourth rule "in equity, or because the defendant was really a repre- "sentative of the State, and the suit was in fact a suit "against the State?"

On these authorities we maintain that the question is concluded. So that, even if the court should reach the conclusion that the suit was in effect a suit against the State, that defense by the appellants did not reach the jurisdiction of the court, but only the merits of the controversy, and the general averments in the bill being sufficient to show the jurisdictional amount involved, the court took jurisdiction of the whole matter in controversy, and, having it, will of course retain it to do full justice between the parties.

3. The third contention of appellants is conclusively answered, we submit, by the opinion of the lower court. That court, in passing upon the contention, at page 821 of the record said:

> "It is claimed that the bill does not allege facts sufficient to bring the discrimination complained of within the rule as to what is essential to constitute illegal discrimination in such cases, or, in other words, that it is not alleged that the undervaluation of the property subject to equalization was systematically, habitually and intentionally made. It is true that these words are not used, and the bill might have been fuller in this particular. It does, however, use language that is equivalent thereto. It alleges that the assessors of the various counties in the State uniformly assessed said property below its value, in many instances below 50 per cent., in over 90 per cent. below 80 per cent., and in very few counties above its value, and that the equalizers "*undertook* to equalize all assessments coming before them on the basis of 80 per cent., but in reality did not equalize them at above 80 per cent. of their value. According to these allegations, the assessments of said

"property after equalization could not but have been sys-
"tematically, habitually and intentionally undervalued."

MERITS.

We are thus brought to a discussion of the merits of the controversy. The Fourteenth Amendment of the Constitution declares:

"No State shall deny to any person within its jurisdic-
"tion the equal protection of the laws."

The naked question presented in this case is: Can a State through its administrative officers, intentionally, uniformly, and systematically make some of its citizens bear, proportionately to their wealth, one-fifth more of the burdens of State government than it requires of all the rest of its citizens? Or, putting the proposition a little differently, would it be competent to the State to make a certain class of its citizens pay on the value of their property one dollar on the hundred, for the support of the State, and require of all the rest of the citizens that they should pay only eighty cents on the hundred dollars, for the same purpose? If it could not do this directly, it ought to require no argument to prove that it can not do it indirectly. In other words, great principles do not depend upon mere form, but on substance.

Taxes are the mutual sacrifices of the citizen for the support of the State, in which term, of course, are comprehended all the political subdivisions of the State. Except as these sacrifices are as nearly equal as practicable, the government ceases to be republican, and becomes despotic. Of course, we mean when the lack of uniformity is the result not of

mistake, but of design, and of course it would be the result of design where the *rate* of taxation was different. The essential thing, therefore, to bring our case to an exact parallel with the case where a difference in rate prevails, is to show that the condition complained of, and found by the lower court to exist, is the result of *intention*, and not of *accident.*

In our consideration and study of the facts, it seemed to us entirely practicable to demonstrate that the condition was general, and was the result of *design*, and we undertook, therefore, in the preparation of the case, not simply to prove the facts by a mere preponderance of evidence, but to make it a matter of demonstration. The fact of design is undoubtedly true, and known to everybody in Kentucky, not asleep, and we think the evidence in this case excludes all doubt on the proposition, that the condition, *is* the result of design.

As we have said, the lower court after a prolonged and most careful consideration of the evidence finds no room to doubt that the condition *was the result of design.* The language of the court is that all the property in the State subject to equalization had been "SYSTEMATICALLY, HABITUALLY AND INTENTIONALLY UNDERVALUED TO AT LEAST 20 PER CENT. FOR THE YEAR 1902, FIRST BY THE LOCAL ASSESSING OFFICIALS AND THEN BY THE EQUALIZERS." If this court were disposed to make a most critical examination of the evidence, it would not find any reason to dissent from the conclusion or finding of fact by the lower court, and we do not believe that counsel will seriously contend that the lower court reached an erroneous conclusion on this subject. The historical review of the equalization legislation given by the lower court is of itself the most satisfactory evidence that the legislative department of the State government recognized the fact not only that the property was habitually under-

assessed, but that the average of all assessments by the local assessors was not above 80 per cent. of the cash value.

In the first act providing for the equalization, viz., the act of 1884, no percentage of the fair value upon which to equalize was given, but the board was simply directed to equalize the assessment of property for taxation in the several counties, by adding to or deducting from the assessments such a percentage as might be deemed equitable and just, in order to make the assessments of the different classes of property in each county and in the various counties even or equal, it being expressly provided that the board should not have the power to reduce the aggregate assessments in the State, or to increase them, except in such amount as might be reasonably necessary to a just equalization. (So much of this act as is material will be found in the appendix, pages 12 to 15.)

This act remained in force four years, during which time the board had ample time to study the situation, from the evidence and records before it, and to make up its mind as to what was the fair average of all the assessments in the State, and, it is to be presumed, it gave the benefit of its investigations to the legislature, so that the legislature of 1888 adopted 69 per cent. as the line of fair average of assessments, and directed that all assessments be equalized on that basis, those which were below being brought up to it, and those which were above, being brought down to it. It provided that the various county clerks of the State should, on or before the first day of January in each year, make and file with the auditor, for the use of the Board of Equalization, a tabulated statement, sworn to by them, of all sales of the absolute fee simple title of real estate, as shown by the deed books in their respective counties, town lots being kept separate, made within one year immediately preceding the fifteenth of September previous, stating the price paid, with the terms

and conditions, the number of acres and the assessments of the same for the year. The requirement that the various assessments be equalized on a given basis found by the legislature, presumptively with the aid of the board after four years' experience in studying the various assessments in the State, of course made the prohibition against increasing or diminishing the aggregate assessments in the State unnecessary and useless, because if the mandate of the legislature should be followed, it would not be possible to materially increase or decrease the assessment, and besides, throughout all the legislation on the subject, the board has never for a moment been recognized as an *assessing* board, but only as a board whose *sole duty* was to equalize assessments *already made*, and the whole theory of equalizing as between the counties, on an ascertained or supposed average basis of assessment, negatives the idea that the legislature meant to give any power of equalization except on the basis prescribed by the legislature. Thus the legislature gives positive evidence of the fact that it knew that the average assessments in this State were not above 69 per cent. of the fair cash value, notwithstanding the express and stringent requirements of the law, as it had been since the earliest history of the State. But the legislature was powerless to bring the assessments up to a higher standard. It was clear that the statutes were as stringent as they could be made, and yet the power of the voter, and the popular sentiment in the counties, kept the assessments far below the value of the property, the local power and influence varying somewhat in the different counties, but being in practically all of them (and our belief is, in *all* of them) more potent than the fear of the law.

The act of 1888 was amended in 1890 in two respects: (1) in providing that the county judge and county attorney should each verify the work of the county clerk in making

up his transfer sheets, for the use of the Board of Equalization, and should each make oath that they had so verified his work, and found it to be correct. (2) 70 per cent. was adopted as the fair average of assessments, instead of 69 per cent. previously adopted.

It has been said that when the Constitution of 1891 was adopted it changed the law previously existing, in that it required all property to be assessed at "its fair cash value." But that is a mistake. The Revised Statutes which were adopted in 1852 required the assessor to assess property at its "fair and full value." Before the Constitution of 1850 the persons who assessed the property were called commissioners, and they made the primary and only assessment, and the earliest statute on the subject required that the commissioner should assess property at its "fair and full value." The act of 1831 was the first one that required the taxpayer to make oath to the correctness of his assessment lists, and that required that he should make oath that the value of the property listed by him was "true and full and faithful value of the same to the best of his knowledge and belief." This feature of the act of 1831 was, however, repealed by the act of 1838, and was not restored until the Revised Statutes took effect in 1852. The act of 1838, however, required the assessor to take an oath that he would fix "a fair and full value" on the property listed for taxation. So that, we repeat, the rule adopted by the Constitution that all property should be assessed at its "fair cash value" was not a new one, but was in exact accordance with the rule which had always prevailed in the State. Nor did the fact that the statutory rule was put into the Constitution have any more potent effect on the local assessing officers than the pre-existing statutes, and the legislature of 1902, eleven years after the adoption of the present Constitution, recognizing the fact that

all laws, whether constitutional or statutory, were impotent to bring the average assessments up to a higher standard, again adopted 70 per cent. as the fair average of all the assessments in the State. And from our own investigation we believe this is as close an approximation of the fair average of assessments as can be made. Indeed, a comparison of the assessments for 1902 with the tabulated transfer sheets furnished by the various county clerks, and sworn to by them, and the county judges and county attorneys, will show that the average of assessments of *all* lands for the year 1902 was almost exactly 70 per cent. of the "fair cash value" as shown by the transfer sheets. The average of assessments of the *very land sold* during the year was about 79 or 80 per cent., but the average of *all* the assessments, including the assessments of the lands transferred the previous year, was 70 per cent. The reason for the difference is that it became known among the local assessors that the Board of Equalization was going to try to bring all the assessments up to 80 per cent., as determined by the transfer sheets. Thereafter, for that one year, they would assess the property which, having been sold within the previous year, would appear on the transfer sheets at 80 per cent. or more of the transfer price, and the following year drop back to a lower assessment. The lower court comments upon the evidence establishing this practice. (Rec., 802.) In the course of this discussion, the court said:

> "An assessor for a certain county, whose term of office "covered the years 1898, 1899, 1900 and 1901, and who, "therefore, made the assessment for the year 1902, in the "fall of 1901, for his county, states in an affidavit that "during his term of office it was the rule to assess the "real estate in his county at about 60 per cent. of what "it would, in the opinion of the assessor and supervisors,

"bring at a fair voluntary sale—this being supposed to meet "the constitutional and statutory requirement of 'fair cash "value'—that the only exception to this rule was in the "case of transfers of real estate—that this property was "assessed at 80 per cent. of the purchase price for the "year in which the transfer was made, and that the next "year the assessment was lowered to the 60 per cent. "basis. The object intended to be accomplished by this "method of procedure is thus stated by him:

"'The object of this was to make a showing on the "transfers which would keep the State Board of Equali- "zation from raising the entire county—it being deemed "good business to let a few transfers bear for one year the "increase, rather than the entire assessable property of "the county.'"

Comment was made in the lower court, by counsel for appellants, on the fact that no assessments were reduced by the board, but the reason for that is that the assessors, having knowledge of the basis adopted by the State, purposely kept down their assessments to about or below the line adopted by the State, as the fair average assessment, preferring that their respective counties should be raised up to the line, rather than take a chance of a proper reduction.

While in a few counties a comparison of the assessments with the transfer sheets will show that they were assessed at or above the full value, yet the evidence of fraud in this respect is so clear that no one can doubt it. The lower court, commenting on this subject, said:

"Still further, the chairman of the equalizers for the "year 1902, on direct examination, testified that some- "times the transfer sheets were doctored by the supervis- "ors, or by the assessor of a county, and rendered wholly

"worthless as evidence before them, and, when asked "on cross-examination as to what he meant by saying "that certain transfer sheets had been doctored by said "officials, testified that those officials had concluded that "this element of evidence sometimes led to counties being "raised by the equalizers, and, in order to obviate this, the "assessor, when he found that a man had bought a piece "of property for a certain price—say $2,500—he would "insist on the purchaser listing it at exactly what he had "paid for it, and where that was overlooked by the assessor, "it was attended to by the supervisors; that he was sure "that in the year 1902 there were several counties that "had been listed exactly at the prices recited in the trans- "fers; and that his board 'rapped the knuckles' of those "fellows about the matter and indicated that they could "not deceive it in that way. This testimony is concurred "in by that of others of the equalizers. And in their report "for the year 1902 the equalizers have this to say con- "cerning this practice, to wit:

"'We desire also to call attention to the injustice "practiced in some of the counties of the State, of listing "the lands and lots sold during the year at a valuation "out of any proportion to the valuation fixed upon the "other lands and lots in the same county. The price "which real estate in a community brings upon the "market affords a very fine index to the correct valuation "of property in that locality, and should greatly aid the "assessor and supervisors in arriving at a fair valuation, "not only of the property transferred, but of other prop- "erty similarly situated. It is manifestly unjust, however, "to require the owner of real estate which has been sold "during the year to list it at its full cash value, and at "the same time allow his neighbors with property equally "valuable to escape with valuations grossly out of pro-

"portion. Nor does this injustice in any way enable the "counties practicing it to escape detection by this board "where their other property is not valued up with the "transferred realty. By a system gradually perfected and "elaborated by years of experience and study of the "question, this board has found it possible always to "detect an effort to escape the just operation of the law "by this species of "doctoring" the list of transferred "property. The custom is so manifestly unjust, both to a "class of taxpayers and to this board, that we trust this "year the supervisors will see that the real estate not sold "in the several counties is listed as well as that portion "of it which is transferred.'

"Just to what extent the assessments for the year 1902 "were doctored in this way, the evidence does not dis- "close. The fact that in as many as 29 of the counties "where the percentage of assessment to fair cash value "exceeded 80 per cent., this applied to both assessments "of lands and town lots, that in 6 of these the assess- "ments of lands and town lots were exactly of the same "percentage, and in 13 others they were within 1 and 2 "per cent. of each other, is calculated to make one sus- "picious as to the assessments of a large majority of the "counties whose percentage exceeded 80. But that the "doctoring was not confined to those counties whose per- "centage exceeded 80, is shown by the affidavit of the "assessor referred to, the percentage of whose county, "according to his statement, was 80 as to all real estate "sold, but, according to other evidence in the record, was "78 as to lands and 75 as to town lots."

Not only does the record disclose the most convincing and conclusive evidence of systematic and intentional under-

assessments, but the equalization statutes, from 1884 to 1902, show knowledge and recognition, and express approval by the legislative department, of the government itself. For, under the existing conditions, how could it be expected that a local assessor would assess all the property in his county at above the statutory basis, when the counties whose assessments were below 70 per cent. would, under the law, be raised only up to that point, and his county could insist, under the law, upon being lowered down to that point? What reason would he give to his constituents for deliberately making their assessments higher than the basis fixed by the statute, when the only effect would be to entail on the citizens trouble and expense in going up to the capital and appearing before the board and establishing, by evidence, the fact that their county had been assessed above the line fixed by the legislature? If he should say that the statute required him to assess the property at its "fair cash value," his constituents could, with great force, point out to him that the statute should be construed in connection with the equalization statute, and, taking the two together, he must assume that 70 per cent. was the "fair cash value" for the purpose of taxation. Whether this position would be sound or not, is not to the point. Experience has shown that it has given the assessors an excellent reason, and a salve for their consciences, in yielding to the local pressure from their constituents.

Not only have we the evidence that the *legislature* knew and recognized the practice of underassessments, but we have the evidence of the *Court of Appeals*, the court of final resort in this State. In the case of Spalding vs. Hill, decided in 1888, in 86 Ky. 656, the court, speaking of the Board of Equalization, said that it was "its duty to examine into the assessments of the several counties, and in case the assessments of one or more counties are found relatively higher or

lower than in other counties, to equalize the taxes among the several counties according to the value of the property therein. * * * *But they have not the power to increase or decrease* the total valuation of the State. *Their power is limited to equalizing.*" (Italics ours.)

Again the court said:

> "It is the settled doctrine of this State that, for the pur-
> "pose of taxation, property must be assessed according
> "to its true value; that equality of burden is essential to
> "the correct administration of the government. *But it is*
> "*a fact known by all* that for years past the grossest ine-
> "qualities have existed in the values fixed upon all kinds
> "of property by the county assessors, and that the county
> "Boards of Supervisors have failed to correct the evil. In
> "some counties it is said that assessors secure their elec-
> "tion by pledges made to assess the property in the
> "county, or certain kinds of it, at a low value. In creat-
> "ing the State Board of Equalization, the object was to
> "correct this evil, and to have the assessment of taxes in
> "the several counties equalized according to the value
> "of the property therein, so that the State government
> "might be supported by just and equal taxation." (Our italics.)

Thus, without going into the details of the evidence, which we did very elaborately in the lower court, we think we have established beyond question the *intentional* undervaluation. The details of the evidence appearing in the record are far more convincing, but, in place of going into these details again, we refer to and rely upon the opinion of the lower court on that branch of the case as entirely convincing.

Assuming, then, that the undervaluation has been *systematic and intentional*, what could, from the legal standpoint,

possibly be the difference between such a discrimination against some citizens in favor of others and the case heretofore suggested, where the legislature deliberately applied one *rate* of taxation to one class of citizens and a lower rate to another class, especially in view of our State Constitution, which declares:

> "Taxes shall be levied and collected for public purposes "only. They shall be uniform upon all property subject "to taxation within the territorial limits of the authority "levying the tax." (Section 171.)

Or, in view of the Fourteenth Amendment of the Federal Constitution, which declares that the State shall not "deny to any person within its jurisdiction the equal protection of the laws." Are citizens thus treated given, or denied, the equal protection of the laws? There is but one answer that can be given, and it is obvious. Can any one maintain that it is equality under the law to tax A one dollar on the hundred dollars, and B fifty cents on the hundred? If there be *power* to do this, then there is only a difference in *degree*, not in *power*, between that and taxing A *two dollars* on the hundred, and B *twenty cents* on the hundred. And the same power would justify the raising of the whole tax from the property in a part of the State, or certain counties in the State, to the exclusion of the rest of the State. The exercise of such a power, or such a right, is the exercise of the right to destroy certain classes for the upbuilding of others.

AUTHORITIES.

We ask permission to adopt as a part of our argument the following lengthy quotation from the extremely able opinion of Judge Taft, delivered for the Circuit Court of

Appeals for the Sixth Circuit, in the case of Taylor vs. L. & N. R. R. Co., 88 Fed. Rep. 364. It is an admirably reasoned opinion as well as an able review of the authorities. The opinion was delivered in a case based upon exactly the same lines, and which sought the same relief as this one. In discussing the question, the court said:

"The sole and manifest purpose of the Constitution "was to secure uniformity and equality of burden upon "all the property in the State. As a means of doing so "(conceding that defendant's construction is the correct "one), it provided that the assessment should be accord- "ing to its true value. It emphasized the object of the "section by expressly providing that no species of prop- "erty should be taxed higher than any other species. "We have before us a case in which the complaining "taxpayer, and other taxpayers owning the same species "of property, are taxed at a higher rate than the owners "of other species of property. This does not come about "by legislative discrimination, but by the intentional and "systematic disregard of the law by those charged with "the duty of assessing all other species of property than "that owned by complainant and its fellows of the same "class. This is a flagrant violation of the clause of "the Constitution forbidding discrimination in taxation "between different species of property. That clause is "self-executing. Reelfoot Lake Levee Dist. vs. Dawson, "97 Tenn. 160, 36 S.W. 1043. How is it to be remedied? "It is said on behalf of the defendants that the only "method consistent with the Constitution is by raising "the assessments of the real and personal property. This "is no remedy at all. It has been suggested (but we can "not regard the suggestion as a serious one) that the

"railroad companies of the State should go before the "taxing authorities of each county, and, after notifying "each taxpayer, attempt to secure an increase in the total "tax assessment of the real and personal property of the "State from $312,000,000 to $416,000,000. The absolute "futility of such a course, the enormous expense, and the "length of time necessary in attempting to follow it, "need no comment. The question presented is, then, "whether, when the sole object of an article of the Con- "stitution is being flagrantly defeated, to the gross pecu- "niary injury of a class of litigants, and one of them "appeals to a court of equity for relief, it must be with- "held because the only mode of granting it will involve "an apparent departure from the method marked out by "the Constitution and the law for attaining its sole object. "We say 'apparent' departure from the constitutional "method, because that instrument contemplated a system "in which all property should be assessed at its real value. "It did not intend that a large part should be assessed at "75 per cent. and a smaller part at 100 per cent. The "method of assessing one species of property can not "be truly said to be constitutional, without having regard "to that pursued with other species; for the essence of "the constitutional requirement is uniformity, and uni- "formity can not be affirmed to exist without a due "regard to the methods of assessing all species. There- "fore, to enjoin the enforcement of the prescribed method "of assessment as to one species of property, when there "is a departure from it as to all others, if the injunction "secures uniformity as to all, is not so great a violation "of the method really prescribed as that involved in a "continuance of the existing conditions, and the denial "of relief to the injured taxpayer. The court is placed

"in a dilemma, from which it can only escape by taking "that path which, while it involves a nominal departure "from the letter of the law, does injury to no one, and "secures that uniformity of tax burden which was the "sole end of the Constitution. To hold otherwise is to "make the restrictions of the Constitution instruments "for defeating the very purpose they were intended to "subserve. It is to stick in the bark and to be blind to "the substance of things. It is to sacrifice justice to its "incident. The same dilemma has been presented to "other courts. They have not always taken the same "horn. There is a conflict of authority, but we are glad "to say that the adjudications of that court whose decision "we must follow support the views we have above "expressed. Before examining the cases in the Supreme "Court of the United States, let us refer to the decisions "of some of the State courts upon the question:

"In Randall vs. City of Bridgeport, 63 Conn. 321, 28 "Atl. 523, the case came into court on a direct appeal "from the action of a board of equalization, called the "'Board of Relief of the City of Bridgeport.' The "Superior Court found as a fact that it had been the uni- "form rule of the Board of Assessors and the Board of "Relief of that city to value all property, for the purpose "of taxation, at one-half of its fair market value. The "court found that the plaintiff's property was assessed at "its full market value, as the statute required. The "Supreme Court held that the complainant was entitled to "an assessment of one-half the real value of his prop- "erty, and this in the face of a mandatory provision of "the statute that all property should be assessed at its "true value. The court said:

"'There are two ways in which a taxpayer may be "wronged in levying taxes: An assessment may conform

"to the statute generally, and the individual may be "assessed in excess of the statutory requirement. A "wrong of that description is easily redressed. But when "the town disregards the statute and establishes a rule of "its own, assessing the property at one-half of its actual "value, and then assesses an individual at the full value "of the property, while the injury is the same, the appli- "cation of the remedy becomes more complicated. Prac- "tically the only way to redress the wrong is to reduce "the assessment, and that makes the court seem to disre- "gard the statute, while, if the wrong is not redressed, "there is a denial of justice, and the court practically "ignores the statute giving an aggrieved party an appeal, "and practically ignores the statute which provides that "'said court shall have power to grant such relief as shall "to justice and equity appertain.' Thus we are in a "dilemma. If we choose one horn of it, a public statute "is violated, not so much by the court as by the town, but "by an apparent approval of the court as to one individ- "ual, and that by an express command of another statute, "and by the dictates of justice. If we take the other "horn, the court itself violates a remedial statute, and "becomes in a measure a party to the wrongdoing. "Under the circumstances, we do not hesitate to choose "the former, and to redress the wrong.'

"This, it is true, was a direct review of the action of "the board of equalizers; but the court, in reaching its "conclusion, expressly proceeded under the power given "it by statute to grant such relief as to justice and equity "should appertain. This court is entitled to grant to the "complainant exactly the same character of relief. As "already pointed out, the fact that the injunction to assess "property at its true value is found in the statute, and "not in the Constitution, can not create any distinction

"in respect to the point we are now discussing, for either "is equally binding on the taxing officers and the courts. "Courts have no more right to set aside a lawfully enacted "statute than they have to defeat the operation of the "Constitution. The point of this case, and those about "to be cited, is that, where either the uniformity required "by law, or the prescribed means of attaining it, must be "departed from, the court will choose the lesser evil.

"In Cocheco Co. vs. Strafford, 51 N. H. 455, the law "provided that the selectmen should appraise all taxable "property at its full and true value in money. The stat- "ute further provided that the court should make such "order thereon as justice required. Mr. Justice Doe, upon "this point, in a concurring opinion, said:

"'Justice requires an equal rate of taxation of Strafford "real estate. If the Strafford real estate of others was "appraised in 1870 at a less rate than its full value, the "real estate of the plaintiffs should be appraised by the "commissioners at the same rate, so that the plaintiffs "shall pay their proportion of tax and no more. The "usual rate in farming towns is well understood, and the "practice of undervaluation is so universal as to raise a "presumption of fact that it prevails in Strafford. When "the commissioners have ascertained the fact of the full "value of the plaintiff's Strafford real estate on the first "day of April, 1870, they should proceed further, and "appraise it at its value as compared with the value at "which other Strafford real estate was appraised by the "selectmen in 1870. This comparative value is the only "question which the commissioners are appointed to "decide, and is a pure question of fact.'

"This language was approved in Manchester Mills vs. "Manchester, 58 N. H. 38, on a petition for the abatement

"of the real estate tax, in which the court appointed a "committee to find and report—First, the true value of "the plaintiff's estate; and second, the true value of real "estate of Manchester, other than plaintiff's, compared "with its assessed value. The question whether the "second point was a proper subject for inquiry came "before the court, and it was held that it was a proper "subject of inquiry, and that the abatement should proceed "on the findings made upon such inquiry.

"In *Ex parte* Ft. Smith & Van Buren Bridge Co., "62 Ark. 461, 36 S.W. 1060, the case arose on an appeal "from the refusal of the county Board of Equalization to "reduce the taxation of assessment upon the petitioner's "bridge. The assessor had assessed one-half of the bridge "in Crawford County at $150,000, and the county Board "of Equalization had reduced this assessment to $125,000. "At the trial in the Circuit Court it appeared that "$250,000 was a fair market price for the entire bridge, "and that $125,000, therefore, was the full value of one-"half of the bridge. It further appeared that all the "real estate in Crawford County was assessed at 50 per "cent. of its actual value. The Appellate Court con-"tended that, under the circumstances, the assessment "of one-half the bridge should be reduced, according to "its request, to $75,000. The Constitution of the State "was exactly in the words of the Tennessee Constitution, "to wit:

"'That all property subject to taxation shall be taxed "according to its value, to be ascertained in such manner "as the General Assembly shall direct, making the same "equal and uniform throughout the State, and provided "further that no one species of property, upon which "taxes shall be levied, shall be taxed higher than another "species of property of equal value.'

"The law passed in pursuance of this section of the "Constitution required the assessors of the counties in "the State to assess the real estate at its true market "value in money. The court, in construing this question, "said:

"'It may be said that, inasmuch as its property was not "assessed above its true value, it had no right to complain. "but this is not true. It had the right to demand that no "unequal burden be imposed upon it by taxation. The "duty to contribute to the support of the State govern- "ment by the payment of taxes is imposed upon all per- "sons owning property subject to taxation. The Con- "stitution provides that this burden shall be apportioned "among them according to the value of their property, to "be ascertained as directed by law. When, therefore, "the property of a few is taxed according to its value, and "of all others at one-half its value, then the few are "required to contribute double their portion of the bur- "den. This is manifestly a wrong, and justice demands "that it be redressed whenever it can be done conforma- "bly to the laws. * * * In this case the County "Court acquired jurisdiction, by the appeal of the bridge "company, to grant relief from the illegal, erroneous, or "unequal assessment of appellant's property, but did not "acquire the right or authority to make the valuation of "all real property in the county for the purposes of taxa- "tion, in all cases in which it had not been done, the true "value, by raising it, or to change the valuation of any "property except the bridge. The assessment of no "property can be increased without notice first given to "the owner by the Board of Equalization. How, then, "was the County Court to afford relief to appellant? The "only relief it could have afforded was to reduce the val-

"uation so as to make it conform to the standard adopted "in the valuation of the other real property in the county, "or the average valuation of such property. Why should "not this relief be granted? The valuation of property is "only a constitutional means adopted for the purpose of "making the burdens of government bear upon each tax- "payer in proportion to the value of his property. The "relief suggested accomplishes that end in this case. By "granting it, a constitutional right will be enforced, and "by denying it, will be withheld, because the means "devised for its enforcement were not adopted. By pur- "suing the latter course, the Constitution will be made "the means of defeating itself, by the imposition of "unequal burdens. To avoid this result, the relief should "be granted.'

"In the case of Board of Supervisors of Bureau Co. vs. "Chicago, B. & Q. R. Co., 44 Ill. 229, the appeal was a "direct appeal from the Board of Supervisors, which "assessed the value of the railroad company. It appeared "that the valuation of property of individuals, except that of "the railroad company, ranged from one-fifth to one-third, "while that of the railroad company ranged from one- "third to one-half; and the Appellate Court decided that "the assessment of the railroad property must be at the "same percentage of the real value as that of individuals. "The Constitution of Illinois required the General Assem- "bly to provide for levying a tax by valuation, so that every 'person and corporation shall pay a tax in proportion "to the value of his or her property; such value to be "ascertained by some person or persons to be elected or "appointed in such manner as the General Assembly shall "direct, and not otherwise. The act to carry out this "section, provided that each separate parcel should be

"valued at its true value in money. The court held that "it was the duty of the supervisors to impose the same "percentage of assessment upon the railroad company as "had been assessed by the assessors upon the property of "individuals. The court said:

"'It is no argument to urge that the fault is with the "assessors in the case of individuals, and with railroad "companies in making out their schedules for the county "clerk. If the assessors violate their duty, are railroad "companies to be the sufferers? If they neglect to act "fully up to all the requirements of the law, is that any "reason why A should pay forty per cent. more taxes in "proportion to value than B? The rule adopted by the "assessors in this State has grown into a custom, and has "been tacitly sanctioned by every department of the gov- "ernment for a long course of years, and it is now too "late to challenge it. * * * Would not the sense "of justice of every man in this community be outraged "by allowing this or any other depreciation to one class "of people, and demanding of another a higher tax on a "similar article of the same actual value? The proposi- "tion can not commend itself to the favor of any just man, "and can receive no countenance in a court of justice. It "is an admitted fact on both sides of this controversy that "the property of no one owner in the County of Bureau "has been taxed on its real value, and that the per cent. "added by the Board of Supervisors to the valuation of the "property of appellees imposes on them a greater propor- "tionate burden than the law requires them to bear. We "are of this opinion, and therefore consider the action of "the board unfounded in justice, and in direct opposition "to the Constitution. The great and attractive feature of "uniformity has been disregarded by the board, and

"appellees victimized. It may be very desirable that the "greatest share of the public burdens shall be borne by "these corporations, but, until there be a radical change "in our fundamental law, it can not be done. They stand "on the platform of equality before the law, and no "greater burden for the support of government can be "imposed upon them than can be placed on the individ-"ual taxpayer.'

"In the case of Chicago, B. & Q. R. Co. vs. Board of "Com'rs of Atchison Co., 54 Kan. 781, 39 Pac. 1039, the "railroad company filed a bill in equity to enjoin the col-"lection of 75 per cent. of its taxes levied against it in "Atchison County. The railroad was assessed by a State "Board of Railroad Assessors, who assessed the road at its "true and actual value. In the county of Atchison all "the city and township assessors, for the purpose of carry-"ing on an equal basis the assessment, agreed among "themselves to assess all property 25 per cent. of the true "value of the same. The railroad property was thereupon "assessed at the true value, while the property of indi-"viduals and other corporations in Atchison County was "assessed at 25 per cent. of its real value. The Constitu-"tion of the State required that the legislature should "provide for a uniform and equal rate of assessment and "taxation. The legislature provided that all property "should be assessed at its true value. The court said:

"'This unequal valuation was not the result of an "accidental omission of property from the assessment "list, or an accidental valuation of property at more or "less than its true value. The State Board of Railroad "Assessors valued railroad property in Atchison County, "for taxation, at its true value, but the city and township "assessors of that county, by an agreement between

"themselves, assessed all the other property of the county "at 25 per cent. of its true value. Thus, by concerted "action, the statute of the State was flagrantly disre- "garded. * * * There has been gross discrimina- "tion in the taxation of the railroad property. The law has "not been observed. The taxes complained of are not "equal and uniform. While exact equality and uniform- "ity can not be had, and while mistakes and omissions "by assessors may not in all cases be the subject of ade- "quate remedy in the courts, yet for the gross injustice "and violation of the law complained of there ought to "be some remedy. The plaintiff below, having tendered "all of the State taxes and also its just share of the "county and other taxes, is entitled to have enjoined the "collection of the illegal excess.'

"As has already been said, there are cases in which the "other horn of the dilemma has been taken, the injustice "to the complaining class of taxpayers has been allowed "to continue, and the violation of constitutional or stat- "utory uniformity and equality has gone on unhindered, "in order that the letter of the law may be preserved "while the spirit is flagrantly broken. Wagoner vs. "Loomis, 37 Ohio St. 571; Central R. Co. vs. State Board "of Assessors, 48 N. J. Law, 1; 2 Atl. 780. See also City "of Lowell vs. County Com'rs, 152 Mass. 372; 25 N. E. 469.

"We are relieved from a further discussion of the ques- "tion by the decision of the Supreme Court of the United "States in the case of Cummings vs. Bank, 101 U. S. 153. "In that case the assessors of real property, the assessors "of personal property, and the county auditor (who was "the assessing officer of the first instance for bank shares) "of the county where the complainant bank was situated "agreed to assess real and personal property at one-third

"its value, and money or invested capital at six-tenths its "value. This agreement was in violation of the statutes "under which they were acting, which required assess- "ments to be at the true value in money. The State Board "of Equalization for banks increased the assessment of "complainant's bank shares to their full market value. "The State board had no power to equalize bank shares "with real or personal property, and, in assessing these "bank shares at their full value, it was following the exact "course prescribed by statute, and the statute was passed "in accordance with the Constitution of Ohio, which "requires the legislature to pass laws taxing all property "'by uniform rule at its true value in money.' This "action was brought by the complainant bank to enjoin "the county treasurer from collecting the tax on the assess- "ment against its shares which had been certified down "by the State Board of Assessors. The Circuit Court of "the United States enjoined the treasurer from collecting "a tax on a valuation greater than one-third of the real "value of the shares. The effect of this order was to "annul an assessment by the State Board of Equalization "which was strictly in accordance with the letter of the "statute governing it in the discharge of its duties, and "which was equally in accord with the standard of value "for assessment fixed by the Constitution of the State. "The decree of the Circuit Court was affirmed by the "Supreme Court on the principle stated by the court, as "follows:

"'When a rule or system of valuation is adopted by "those whose duty it is to make the assessment, which is "designed to operate unequally, and to violate a funda- "mental principle of the Constitution, and when the rule "is applied, not solely to one individual, but to a large

"class of individuals or corporations, that equity may "properly interfere to restrain the operation of this uncon- "stitutional exercise of power.'

"It should be noted that, although the complainant "was a national bank, the case did not arise under the act "of Congress, but was expressly based on the right of the "complainant, under the State Constitution, to uniformity "of taxation according to value. The taxing laws of "Ohio did not provide one tribunal of appeal for equali- "zing values of all classes of property, and it was objected "on behalf of the bank that, in view of the constitutional "injunction upon the legislature to pass laws taxing all "property by uniform rule at its true value in money, a "system in which different classes of property were "assessed by independent tribunals, with no common "revisory authority, must be invalid, because so poorly "adapted to secure uniformity. The court did not yield "to this argument, however. Mr. Justice Miller, deliver- "ing the opinion of the court, gave its reasons for not "doing so as follows:

"'But there are two reasons why we can not so hold: "First, it might be that in every instance the result would "be the valuation of bank shares at a lower ratio in pro- "portion to their real value than that of any other prop- "erty, and therefore plaintiff would have no ground of "complaint. And, secondly, what is more important, if "these original valuations and equalizations are based "always, as the Constitution requires, on the actual money "value of the property assessed, the result, except as it "might be affected by honest mistakes of judgment, would "necessarily be equality and uniformity, so far as it is "attainable. So that, while it may be true that this system "of submitting the different kinds of property subject to

"taxation to different boards of assessors and equalizers, "with no common superior to secure uniformity of the "whole, may give opportunity for maladministration of "the law, and violation of the principle of uniformity of "taxation and equality of burden, that is not the neces- "sary result of these laws, or of any one of them; and a "law can not be held unconstitutional because, while its "just interpretation is consistent with the Constitution, it "is unfaithfully administered by those who are charged "with its execution. Their doings may be unlawful, "while the statute is valid. The evidence, we are com- "pelled to say, shows this to be true of the case before "us.'

"The justice then discussed the facts, to show that the "laws had been unfaithfully administered by those charged "with their execution, and that as the only method pro- "vided in the system by which constitutional uniformity "was to be secured, namely, by taxing all property at its "true value in money, though required by statute, had "been departed from by the administrators of the law in "assessing other classes of property than that held by the "complainant, equity might relieve complainant from "his unequal burden thus placed on him by enjoining "taxation on more than one-third of the assessment against "him, though his property had been only taxed at its true "value. After commenting on the widespread custom or "rule in many States to undervalue real estate, growing "out of the effort of the landowner to produce something "like equality of burden with personal property, which "escapes taxation by being hidden, the justice concluded:

"'But, whatever may be its cause, when it is recog- "nized as the source of manifest injustice to a large class "of property, around which the Constitution of the State

"has thrown the protection of uniformity of taxation and "equality of burden, the rule must be held void, and the "injustice produced under it must be remedied, so far as "the judicial power can give remedy.'

"The case before us can not in any material respect be "distinguished from the Cummings case. In this case, as "in that, the injunction sought is against the enforcement "of an assessment upon complainant's property which "was made at the true value of the property, in accordance "with the mandate of the Constitution and statute, by "assessing officers who had not themselves discriminated "against complainants' property by undervaluing other "species of property, and who were not themselves guilty "of any fraud. In this case, as in that, the unjust opera- "tion of the assessment grows out of the systematic and "intentional undervaluation of other species of property "by assessors who are not responsible for the assessment "complained of. In this case, as in that, the effect of the "injunction is to compel certain assessors of the State "to reduce their assessments to the illegal standard of "valuation adopted by different and unfaithful assessors of "other species of property, and is justified by the result "that in this way is secured something like uniformity, "which is the sole purpose of the Constitution. It has "been pressed upon us that no such preconcert of action "by the assessing officers, and no such uniform rule of "undervaluation have been shown in this case as appeared "in the Cummings case, and that upon these circum- "stances the Cummings case turned. We have already "found, from the evidence, that there is an intentional "undervaluation of property in each county and that this "is uniform as to all real and personal property, and "results from a clear understanding between the assessors

"and county Boards of Equalization, who have a com-
"mon motive for the reduction. More than this, it is
"clearly shown that the State Board of Assessors and
"Equalizers in 1896 intentionally equalized all real estate
"in the State at 75 per cent. of its true value for the tax-
"ation of the year 1897. Could preconcert be clearer
"than this? It is further said that, before the remedy pur-
"sued in the Cummings case can become applicable, it
"must appear that the undervaluation of one species of
"property was adopted as a rule of action by the assessors
"for the fraudulent purpose of discriminating against the
"complaining taxpayer and his class, and that no such
"case is presented to this court. Now, it is true that,
"before equity will relieve in such a case, it must appear
"that the assessing officers whose acts of undervaluation
"created the unjust burden must intentionally and habitu-
"ally violate the law by assessing property at a less valu-
"ation than that which they know to be its true value;
"but it is not true that they must be shown affirmatively
"to intend to injure complainant and his class of taxpayers
"in so doing. It is true that in the Cummings case the
"unfaithful assessors, or some of them, did undervalue
"both real and personal property, and money capital, in
"which were included bank shares, at different percentages
"of their true value; but the assessment of which com-
"plaint was made was not the work of these assessors at
"all, but, as here, of a State board of equalization. An
"intentional undervaluation of a large class of property,
"when the law enjoins assessment at true value, is neces-
"sarily designed to operate unequally upon other classes
"of property, to be assessed by other taxing tribunals, who
"it may be presumed, will conform to the law. In the
"case at bar the county assessors and Board of Equaliza-

"tion of each county have been actuated in their viola-
"tions of the law by the desire to reduce, as far as may
"be, their counties' share of the State burdens. Their
"undervaluations of property have been uniform as to all
"property in their counties but railroads. They could not
"but know that such undervaluations must work an injus-
"tice against the property of railroads, if assessed at its true
"value by a State board, and taxed for county and State pur-
"poses on that basis. In this sense, the rule of undervalua-
"tion adopted in each county is necessarily 'designed to
"operate unequally,' within the meaning of Mr. Justice
"Miller in the Cummings case. The *ratio decidendi* of
"that case is to be gathered from the facts, and the language
"of the opinion is to be interpreted in the view of the
"facts. The case has been commented on by the Supreme
"Court in a number of subsequent cases, but it has never
"been modified or overuled.

"Bank vs. Kimball, 103 U. S. 732, was a bill to enjoin
"the collection of taxes. The bill was dismissed on
"demurrer. The bill averred, in effect, that complain-
"ant's bank shares were assessed at less than their value,
"by 50 per cent., but that other property was assessed at
"less even than this, and that for this reason no tax
"should be paid on the bank shares. Referring to the
"Cummings and other cases, Mr. Justice Miller, who spoke
"for the court, said:

"'It is held in these cases that, when the inequality of
"valuation is the result of a statute of the State designed
"to discriminate injuriously against any class of persons
"or any species of property, a court of equity will give
"appropriate relief, and also where, though the law itself
"is unobjectionable, the officers who are appointed to
"make assessments combine together, and establish a rule

"or principle of valuation, the necessary result of which "is to tax one species of property higher than others, and "higher than the average rate, the court will also give "relief. But the bill before us alleges no such agreement "or common action of assessors, and no general rule or "discriminating rate adopted by a single assessor, but "relies on the numerous instances of partial and unequal "valuations, which establish no rule on the subject.'

"In Supervisors vs. Stanley, 105 U. S. 305, the aver- "ment of a petition of a national bank seeking to recover "taxes claimed to have been illegally paid was that the "assessment of its shares was at a greater rate than was "assessed upon other moneyed capital in the hands of "individual citizens of the State of New York. In grant- "ing a right to amend and have a new trial, Mr. Justice "Miller, speaking for the court, said:

"'If by this it is supposed that a few individual "instances may be shown of partial assessments favoring "citizens as compared with the national banks, we think "it is erroneous. But if it is intended to allege that, apart "from the question of the right of the shareholder to "deduct from his debts—a question which in this case was "disposed of, and was in issue—it can be proved that the "assessors habitually and intentionally, or by some rule "prescribed by themselves or by some one whom they "were bound to obey, assessed the shares of the national "banks higher, in proportion to their actual value, than "other moneyed capital, generally, then there is ground "for recovery, and a hearing as to that should be granted.'

"In Stanley vs. Supervisors, 121 U. S. 550, 7 Sup. Ct. "1239, Mr. Justice Field said:

"'When the overvaluation of property has arisen from "the adoption of a rule of appraisement which conflicts

"with a constitutional or statutory direction, and operates "unequally, not merely on a single individual, but on "a large class of individuals or corporations, a party "aggrieved may resort to a court of equity to restrain the "exaction of the excess upon payment or tender of what is "admitted to be due. This was the course pursued and "approved in Cummings vs. Bank, 101 U. S. 153.'

"In Bank vs. Perea, 147 U. S. 87, 13 Sup. Ct. 194, the "law of New Mexico required property to be assessed at "its cash value. The plaintiff's property was originally "assessed at its full value, while the other property was "assessed at 70 per cent. It appealed to the Board of "Equalization, which reduced the assessment to 85 per "cent. Mr. Justice Brewer said:

"'Surely, upon the mere fact that other property hap- "pened to be assessed at thirty per cent. below the value, "when this did not come from any design or systematic "effort on the part of the county officials, and when the "plaintiff has had a hearing as to the correct valuation on "appeal before the Board of Equalization, the proper tribu- "nal for review, it can not be that it can come into a court "of equity for an injunctiou, or have that decision of the "Board of Equalization reviewed in this collateral way.'

"We find nothing in these cases which should change "our view already expressed, of the effect of the Cum- "mings Case. They merely emphasize the point that "equity will not relieve against an assessment merely "because it happens to be at a higher rate than that of "other property; that such inequalities, due to mistake, "to the fallibility of human judgment or to other acci- "dental causes, must be borne for the reason that absolute "uniformity can not be obtained; that, in other words, "what may be called 'sporadic cases of discrimination'

"can not be remedied by the chancellor. He can only "interfere when it is made clear that there is, with "respect to certain species of property, systematic, inten- "tional and unlawful undervaluations for taxation by the "taxing officers, which necessarily effect an unjust dis- "crimination against the species of property of which "the complainant is an owner. The reason for the "distinction is obvious. The occasional and accidental "discriminations are inevitable in every assessment, and "are not likely to continue, because not the result of an "illegal purpose on the part of any one. If equitable "interference in such cases could be invoked, the obstruc- "tion to the collection of taxes would be so frequent as "to be intolerable. More than this, an action to enjoin a "tax is a collateral attack upon the judgment of a quasi "judicial tribunal; and it can not be justified except on "the ground of an obvious violation of law, or something "equivalent to fraud. It does not lie where the injury "complained of arises only from the erroneous, but "honest judgment of the lawfully constituted tax tribu- "nal. The interference by the chancellor in the case at "bar and in the Cummings Case rests on something "equivalent to fraud in the tribunal imposing the tax. "The various boards whose united action is by law "intended to effect a uniform assessment on all classes of "property are to be regarded as one tribunal, and the "whole assessment on all classes of property is to be "regarded as one judgment. If any board which is an "essential part of the taxing system intentionally, and "therefore fraudulently, violates the law, by uniformly "undervaluing certain classes of property, the assessment "by other boards of other classes of property at the full "value, though a literal compliance with the law, makes

"the whole assessment, considered as one judgment, a "fraud upon the fully assessed property. And this is "true, although the particular board assessing the com- "plainant's property may have been wholly free from "fault of fraud or intentional discrimination. Therefore "the injunction might issue against the assessment upon "the fully assessed property, as void altogether, until a "new and uniform assessment upon all property accord- "ing to law could be made. And such is the rule in "some courts. Weeks vs. Milwaukee, 10 Wis. 263; "Hersey vs. Board, 16 Wis. 192; Smith vs. Smith, 19 Wis. "619. The inequity of allowing the taxpayer to escape "altogether, and the intolerable inconvenience to the "public in the delay incident to such a course, however, "lead a court of equity to shape its order so as to allow "only so much of the fraudulent judgment to be enforced "against the complainant as may be done without "imposing on him any inequality of tax burden."

All the authorities cited by counsel for appellants on the merits of this case were reviewed by Judge Taft in the opinion herein quoted from, except the case of New York vs. Barker, 179 U. S. 284-6. In that case, however, there was neither allegation nor proof of any underassessment, but this court was asked to take judicial notice of the practice of underassessment, apparently on the authority of a statement made by Mr. Justice Miller in the Cummings case, in which he said:

"The Constitutions and statutes of nearly all the States "have enactments designed to compel uniformity of taxa- "tion and assessment at the actual value of property "liable to be taxed. The phrases 'salable value,' 'actual

"value,' 'cash value,' and others used in the directions to "assessing officers all mean the same thing, and are "designed to effect the same purpose. (Burrow's Taxa- "tion, p. 227, Section 99.) But it is a matter of common "observation that, in the valuation of railroad property, "this rule is habitually disregarded."

This court, however, held that that comment of Mr. Justice Miller was not a part of the decision, nor did the court in that case rely upon any such common knowledge. On the other hand, the allegation and proof in the Cummings case were both satisfactory and supported the contention of the complainant. The Cummings case has been often approved and has never been questioned by this court, so far as we know, and we conclude this part of our argument simply with again calling to the court's attention the fact that, upon a careful and painstaking review of all the evidence, the lower court found as a fact that the underassessments by the assessors and by the board of equalizers had been habitual, systematic and intentional, and we do not believe that this court, even if it feels disposed to go through this large record in the most painstaking and scrutinizing fashion, will find any substantial ground to dissent from that conclusion.

BRIEF OF APPELLANTS.

We shall make the remainder of our argument in the form of as brief responses as possible to the contentions of the appellants.

1. Counsel say that the board first made a tentative assessment of the franchise of appellee of $12,912,626, and then, after argument, reduced the assessment to $10,774,899. Now,

the fact is that the board reached the tentative assessment of $12,912,626 by taking what is known as the "stock and bond" plan; that is, they took the aggregate market value of the stock and bonds, looking back only one year, but when the objections to this plan were made and the authorities upon it were cited to the board, they abandoned the plan altogether, and the present assessment was arrived at upon the plan called the "capitalization plan," which, by the way, is the plan which has always been applied to the appellee. (Rec., 120.) And the amount arrived at by them, viz., $10,774,889, is exactly to a cent the amount reached by the capitalization plan, after deducting from the total value the assessed value of the tangible property. And this was intended as the full value of the property as testified to by the members of the board. This is and was in reality in our opinion an overvaluation.

The correct history of these assessments is given in the opinion of the lower court (R., 811-814), and it is shown that if the board had taken the average valuation for five years as the basis of valuation, the assessment would have been several millions of dollars less than it was on either plan.

The board evidently thought its first plan produced an unjust result, and adopted the old plan of capitalization in order to arrive at the full value. This the board was clearly entitled to do, as appears from the case of Commonwealth vs. Covington Bridge Co., 70 S. W. 849, in which the court through Judge Hobson, responding to the argument that the plan approved by the court in a former case was the only one that could be adopted by the board, said:

> "But this action of the board did not prevent another "board for another year from adopting a different line, if "the law warranted it. There is nothing, therefore, in "any of these cases determining that the board did not "have a right to adopt another basis of assessment."

That opinion is clearly right, because the statute does not point out any particular plan of arriving at the valuation. A large discretion is left to the board to adopt any plan which in its judgment arrives at the value of the property. This is very difficult to arrive at, and no one can say that the value of a railroad company is with accuracy arrived at. All that we can say is, that there may be several methods adopted, some preferable to others, in arriving at value. Now, the board in this instance took a well recognized plan of arriving at value, viz., that of capitalization of net earnings. Certainly it was not a favorable plan to the appellee, because it resulted in capitalizing the skill and good management of the officers of the corporation. The reason against the stock and bond plan, on the other hand, is very clear and convincing, and the opinions of Judge Clark in the case of Railroad and Telephone Companies vs. Board of Equalizers, 85 Fed. 311, and of Judge Grosscup in Chicago Union Traction Company vs. State Board of Equalization, 112 Fed. 607, set out these reasons with great cogency, and no one, we think, can, after considering these reasons, believe that the stock and bond plan is a satisfactory plan for arriving at values.

2. Counsel for appellants undertake a very slight discussion of the evidence in the case, to prove that the lower court was wrong in its finding of fact to the effect that the property had been systematically, habitually and intentionally undervalued, but their discussion of the evidence is so extremely superficial that we feel that it will not stand for a moment against the careful, thorough and painstaking investigation of the court. A few illustrations of the superficiality of their discussion and examination of this question may not be out of place. Counsel, on page 33 of their brief, comment on the fact that only one assessor out of 119 has given his affidavit to the appellee. We have not gone over the vast

array of evidence which the appellee filed with the view of determining how many assessors gave such affidavits; but it is a matter of absolutely no consequence whether only one assessor or more than one assessor has testified for the appellee. The court below, in its opinion, goes into the detail of this evidence, and particularly into twenty-four affidavits of assessors filed by the appellants, and shows how utterly unreliable they all are. All of the affidavits filed by appellant, by the way, on this subject are, we believe, of exactly the same form, employing exactly the same language, being very brief and stereotyped. We did, however, file the affidavits of a great array of witnesses, some of them officials connected with taxation and some otherwise, which showed what the custom of assessing was in their various counties. The second section of the stipulation (Rec., 827) shows that we filed the affidavits of 42 persons who represented their respective counties before the Board of Equalization. It also shows that we filed the affidavit of James M. Shive, sheriff of Allen County, and 81 other affidavits from persons residing in 57 different counties, and embracing 17 county judges, 21 county clerks, 1 deputy county clerk, 2 assessors, 4 deputy assessors, 5 county supervisors, and 3 county attorneys. The fact that the assessors, who were immediately under the authority of the auditor and attorney general, would be unwilling to make an affidavit to the effect that they had intentionally disobeyed the law, and thereby incurred the penalties of the statute for doing so, is not surprising; but this case will not turn simply upon the evidence of the assessors. We lost the case of Stone vs. Trust Company, reported in 107 Fed. Rep., because the evidence was not overwhelming in favor of the complainant, the court, in effect, finding the evidence was not quite strong enough to overcome the presumption in favor of the officers doing their duty. When we undertook this case we also

undertook to get the evidence from the record and otherwise which would make a demonstration of that which was known to all in Kentucky, viz., that the assessors had for years habitually, continually and intentionally undervalued the property. The lower court found that we did make a demonstration of it, and we thoroughly believe that this court, if it sees fit to look into the record, will heartily endorse the finding of the lower court. But to establish this conclusion by going into detail of the facts, in this brief, would probably add from 75 to 100 pages to the brief, and we do not believe that, when the court reads the opinion of the lower court, it will feel the least inclined to go into the details, which the lower court so deliberately and carefully worked out.

Counsel say on page 34:

"The affidavit of Huston Quin and the exhibit there-
"with, filed in complainant's brief, merely present a cal-
"culation of values in 17 selected counties based on an
"assumption that farm lands in 1891 were equalized on
"only 70 per cent. of their cash value. Why so few
"counties, and the particular counties therein named, were
"taken for comparison between the values in that year
"and 1902, is not explained. Even according to this
"exhibit, the equalized value of such lands in five of the
"17 counties named therein for 1902 exceeds 80 per cent.
"of the assumed cash value thereof, as follows:

"Campbell - - - - - -	92 per cent.
"Daviess - - - - - - -	95 per cent.
"Fulton - - - - - - -	98 per cent.
"Magoffin - - - - - - -	116 per cent.
"Morgan - - - - - - -	85 per cent."

Now, the fact is that that affidavit relates to these 17 counties alone, simply because out of 119 counties in the State they were the only counties whose assessment for 1902

appeared to be above 80 per cent. of the cash value, and this comparison of the equalized values of 1902 with the cash values of 1891, made by Mr. Quin, was made for the purpose of showing, and it did completely show, that the equalized values in these counties in 1902 were less than the cash values in 1891.

The equalized value per acre in 1891 is set down in the first column of the statement filed with the affidavit of Mr. Quin, The equalized value for 1902 is set down in the second column of the same statement. The third column shows the cash value per acre for 1891, assuming that the lands in 1891 were equalized at 70 per cent. of their cash value (and, by the way, it is a conceded fact in the record that the lands were so equalized in 1891), and the fourth column shows the per cent. that the equalized value for 1902 is of the cash value for 1891. According to that comparison, there were 12 of the 17 counties whose equalized value for 1902 was less than 80 per cent. of the cash value in 1891, and there were only five counties in which the equalized value for 1902 was greater than the cash value for 1891. The learned counsel would not have to go far for an explanation of this exhibit, and we confess to surprise that such a statement as appears in the brief should have been made.

Counsel then comment in apparently complimentary terms upon the character of the witnesses who are members of the Board of Equalization, and who testified for appellants. A very slight examination into that evidence shows conclusively that that board did deliberately adopt 80 per cent. of the value of the land as shown by transfers to be the cash value of the land, contrary to the mandate of the Constitution, which expressly fixed the standard of value at what the property would bring at a fair voluntary sale. The reasons given by the various members of the board for adopting 80 per cent. are almost ludicrous. One Walker, from

Hickman County, stated, as his reason, that there were so many sales on long time, in which the notes bore no interest, that they thought 80 per cent. of the present value would be a fair estimate of the cash value. It appears from his deposition that we asked him to file one transfer sheet that showed that the notes were taken for the purchase money at long time, without interest. He retired for the purpose of doing so, and after having been gone for a long time returned and refused to do it. We then employed the assistant secretary of the board to go through every transfer as shown by the transfer sheets and ascertain the number of instances in which property had been sold on time, where the notes bore no interest, with the result that out of thousands of such sales there were only TWO instances in which that occurred. Some of the members of the board also spoke of being unable to rely on the transfer sheets because they showed not cash in terms, but an amount equal to cash. A detailed examination showed there were only TWO instances of that kind. (Rec., 113.) Another one of these witnesses, Mr. Eubank, thought it was right to take 80 per cent. as the basis of assessment, because there were so many instances in which the consideration appeared to be love and affection. This is very absurd, because the statute expressly provides that such conveyances are not to be certified up, and, in the next place, if that were true it would tend to *reduce* rather than to increase the percentage, and the percentage ought not to be further decreased by reducing the basis from 100 per cent. to 80 per cent. Another witness, Mr. Meagher, of Frankfort, said they took 80 per cent. because of the fact that there were a number of commissioners' and fictitious sales, shown by the transfer sheets. Just what he means by fictitious sales we do not know, but why they should reduce the general level of assessments to 80 per cent. because of commissioners' sales passes our comprehension. The fact is that

commissioners' sales are always made under the hammer, and the presumption is that any such sales, in place of being too high, are generally too low, and that is a very curious reason for reducing the assessment basis from par to 80 per cent.

Mr. Ringo, the chairman of the board, concurs with the others in all of their errors. In the first place he repeats the statements that many of the sales were made on long time, where the notes bore no interest. He also repeats the statement that many of the sales were made for love and affection, and therefore they were justified in reducing it to 80 per cent. We have shown the absurdity of such statements, but we call attention to the fact that Mr. Ringo, who was the chairman of the board, expressly states that the board undertook to equalize the assessed values already existing as between the counties. That idea of equalization as between the counties of assessments already made shows conclusively, if the court will examine the exhibits filed with the deposition of the assistant secretary, Mr. Thorne, that the assessments could not be equalized at above about 70 per cent. And we call the court's attention to the opinion of the lower court, in which a quotation is made from a report written by this same Mr. Ringo, which shows conclusively that the board did not undertake to assess the property at its par value, but, on the contrary, made an argument to the voters to prove that it did not do anything of the sort, and that the assessment was as low as it had previously been. It may not be out of place just here to quote that part of Mr. Ringo's statement. It will be found in the opinion of the court, at pages 799 and 800, and is as follows:

"The principal charge brought against this board, and "to which it objects, is, in effect, that unreasonable and "unlawful additions have been made to the assessed valu- "ation in the State, that the revenue may be created to

"refill an empty treasury. The facts and figures disprov-
"ing any such charge are these: For the years 1889,
"1890, 1891 and 1892, the last four years under the law
"which requires all real estate to be assessed at 70 per
"cent. of its fair cash value, the average equalized value
"of lands in this State was $237,888,310. It will be
"admitted that lands are very rarely, if ever, either
"assessed or equalized for taxation at more than the law
"requires; then it is safe to assume that the average
"equalized value above given was not greater than 70
"per cent. of the fair cash value of the land in this State.
"Now, if $237,888,310 was only 70 per cent. of the aver-
"age fair cash value of said lands for the years 1889,
"1890, 1891 and 1892, then it necessarily follows that the
"average fair cash value of lands for those years was
"$339,840,404, which amount is $85,023,275, or more
"than 33 per cent. greater than $254.817,129, the amount
"at which the board has this year equalized the value of
"the lands of the State for taxation."

In this connection we call the court's attention to page 35 of appellants' brief, in which they give the total equalized value of lands for 1902 at $258.040,313, which shows that the equalized value for 1902 is something less than 76 per cent. of the average cash value for 1889, 1890, 1891 and 1892, as found by the chairman of the Board of Equalization, although the only evidence in the case on the subject shows an increase in the price of lands during that time of from 20 to 25 per cent.

There is one further statement which we feel bound to refer to, and that is the statement that appellants have filed affidavits of 24 assessors in relation to the practice of assessing for the year 1902. These affidavits were from assessors from Barren, Boone, Bourbon, Bracken, Boyle, Clark, Fayette, Grant, Gallatin, Harrison, Henry, Jessamine, Jefferson, Ken-

ton, Lincoln, Mason, Mercer, Montgomery, Pendleton, Rockcastle, Rowan, Scott, Taylor and Warren. We insert here a table showing the per cent. the equalized value for 1902 is of the cash value of the lands in the counties in which the assessors who made the affidavits live. The per cent. shown in this table is obtained from the actual records of the Board of Equalization, and are, therefore, of vastly more value than the stereotyped affidavit made by the several assessors. These percentages are as follows:

Barren - - -	63 per cent. of transfer value.
Boone - - -	78 per cent. of transfer value.
Bourbon - - -	72 per cent. of transfer value.
Bracken - - -	57 per cent. of transfer value.
Boyle - - -	65 per cent. of transfer value.
Clark - - -	78 per cent. of transfer value.
Fayette - - -	62 per cent. of transfer value.
Grant - - -	58 per cent. of transfer value.
Gallatin - - -	76 per cent. of transfer value.
Harrison - - -	67 per cent. of transfer value.
Henry - - -	53 per cent. of transfer value.
Jessamine - -	67 per cent. of transfer value.
Jefferson - - -	93 per cent. of transfer value.
Kenton - - -	80 per cent. of transfer value.
Lincoln - - -	79 per cent. of transfer value.
Mason - - -	94 per cent. of transfer value.
Mercer - - -	70 per cent. of transfer value.
Montgomery - -	50 per cent. of transfer value.
Pendleton - -	76 per cent. of transfer value.
Rockcastle - -	83 per cent. of transfer value.
Rowan - - -	37 per cent. of transfer value.
Scott - - -	43 per cent. of transfer value.
Taylor - - -	44 per cent. of transfer value.
Warren - - -	63 per cent. of transfer value.

From which it will be seen that out of the 24 counties the percentages which the assessed value bore to the transfer value is less than 80 per cent. in 20 counties, and in 12 of those counties the percentage is less than 70 per cent. In one county, viz., Kenton, the assessment was 80 per cent. exactly, which probably resulted from a plan pursued in Mason County, as shown in the affidavit of Mr. Taylor, presently to be quoted. Of the remaining three counties, one of them is Mason, which shows the highest per cent. of any of them, viz., 94 per cent. Now, the assessor from Mason was Mr. C. Burgess Taylor, and he makes the following affidavit of the method pursued in his county:

"STATE OF KENTUCKY,
"COUNTY OF MASON, } ss.

"C. Burgess Taylor, being duly sworn, deposes and "says:

"I am thirty-two years of age, and was born and raised "in Mason County, Kentucky. I am a practicing attor- "ney at law of the Mason County Bar, and am at present "the master commissioner of the Mason Circuit Court. "I was assessor of Mason County, Kentucky, for the "years 1898, 1899, 1900 and 1901, and assessed the "property of that county for State and county taxation "for each of said years. It was the rule in Mason "County, during my term of office as county assessor, to "assess real estate at about sixty (60) per cent. of what it "would, in the opinion of the assessor and county Board "of Equalization, bring at a fair voluntary sale, and this "sale was supposed to meet the statutory and constitu- "tional requirement that it should be assessed at 'its fair

"cash value.' This rule I, as assessor, and the county "Board of Equalization followed during said years. "Personalty, except cash and notes, was assessed upon "the same basis, but cash and notes were taken at seventy- "five (75) per cent. of their face value, the object being "to equalize them with realty, and therefore this basis "was used. The only exception to the above rule was in "the case of transfers of real estate, that is, such property "as had been transferred within the year, which was "assessed at eighty (80) per cent. of the purchase price "for the year in which the transfer was made, and the "next year this assessment of this property was lowered "to the sixty (60) per cent. basis, and so assessed. The "object of this was to make a showing on the transfers "which would keep the State Board of Equalization from "raising the entire county, it being deemed good busi- "ness to let a few transfers bear for one year the increase, "rather than the entire assessable property of the county.

"C. BURGESS TAYLOR.

"Subscribed and sworn to by C. Burgess Taylor, before "me, this 18th day of October, 1902, and I certify that "my commission as notary public expires on the 4th day "of March, 1904. FRANK P. O'DONNELL,

"*Notary Public.*"

The court will see from this affidavit how easy it was for assessors to make the statement that it was their custom to assess at a fair cash value, because there was always a mental reservation on their part as to what was the fair cash value, and the means of ascertaining it. A flood of light is thrown upon that by this affidavit of Mr. Taylor. He says 60 per cent. of what the property would bring at a fair vol-

untary sale was regarded as the fair cash value. If the court will remember that the affidavits from the counties named were from assessors chosen by appellants to illustrate and strengthen their case, and will look at the percentages as actually ascertained from the records of the Board of Equalization, it will see that the assessments vary from 37 to 94 per cent. Now, in this connection, we will close this part of the discussion with again making the statement that it appears from the actual records of the Board of Equalization, as shown by the assistant secretary (who had no motive whatsoever to falsify the record, and who was really endangering his position, when he testified), that the average assessment of all the lands in the State was 70 per cent. (Rec., 32.)

The court must not, at this point, confuse the statements concerning the equalization of the identical property embraced in the transfers with the equalization of *all* the properties. The former was equalized at about 77 per cent., but the latter was equalized at 70 per cent. This question is asked the assistant secretary:

"Did you also ascertain what was the average for the whole State that the assessed value of the land *included in the transfers* bears to the purchase price named in those transfers?

A. Yes, sir.

Q. What was that per cent.?

A. 77, I think.

Q. Did you also ascertain from the figures you have here the average for the whole State that the equalized value bears to the transfer value?

A. Yes, sir.

Q. What was that?

A. 70 per cent., I think.

These figures were made (as appears from this deposition and the second deposition taken together) very carefully, first,

by taking the assessment in all the counties and dividing by the number of counties, and next by making the figures based on the amounts involved, and the results arrived at are about the same.

Counsel also object to the finding of the board as to the proportion of the appellee's property in Kentucky, and claim that the percentage of the value in Kentucky to the total value is greater than that found by the board. Counsel was started off on this idea by an unfortunate circumstance which has cost the appellee a great deal of money in the past. Prior to 1900, the executive officer of the appellee who made up the company's report for the Board of Valuation and Assessment, was in the habit without observing the distinction in the wording of the statute which applies to the Board of Railroad Commissioners and that which applies to the Board of Valuation and Assessment, of referring in the report to the Board of Valuation and Assessment, or rather to the auditor, to the report which had been previously filed before the Board of Railroad Commissioners, for the purposes of ascertainiug the mileage. Now, the fact is that the statute relating to the Board of Railroad Commissioners (being Section 4096 of the Kentucky Statutes, and found in the appendix), provides for a report to that board of only the miles *operated*, whereas the statute which requires the company to make a report to the Board of Valuation and Assessment for the purposes of assessing the franchise tax, requires the company to report not alone the miles operated, but the entire lines *operated*, *owned*, *leased or controlled* in this State, and in each county, incorporated city, town or taxing district, and the entire lines operated, controlled, leased or owned elsewhere. After this error in making up the report was discovered, an amended report was made up and signed by Charles Haydon, assistant comptroller, which corrected the report which had there-

tofore been made for 1900. In this corrected report there was added the number of miles in Kentucky which were owned by complainant, but leased to other companies, and there was further added mileage outside of the State where the road was owned by other companies and *leased* by complainants, and there was in addition added the mileage of the Nashville, Chattanooga & St. Louis Railroad Company which was *controlled* by the appellee. So that, of course, this court will consider the proposition as entirely unaffected by what the company may have done heretofore in this regard. It certainly will not hold the company to a mistake made by an executive officer through inadvertence or perhaps lack of knowledge.

It is insisted by counsel for appellant, that this change in the mileage has been for the purpose of decreasing Kentucky's proportion of the total valuation. This statement is unjust. When the discovery was made the company set to work to correct this report in all respects so as to conform to the statute governing that particular kind of report; and the first thing it was required to do was to add to its mileage in Kentucky. The Cecilia branch, which was owned by the complainant, but rented to the Illinois Central, is 46 miles long; the Clarksville & Princeton Division, owned by complainant, but rented to the Illinois Central, is 20.70 miles long. A part of the Paducah & Memphis line, 49.23 miles long, and a part of the N., C. & St. L. R'y, 8.06 miles long, was also added to the Kentucky mileage, making 123.99 miles. We hear no complaint of that mileage being added to Kentucky's proportion, but the complaint relates entirely to the mileage outside. Following the direction of the statute, the company added 941.66 miles on account of its control of the Nashville, Chattanooga & St. Louis road, and 624 miles on account of its being the lessee of the Georgia road, and it

is the mileage of these two last roads that the counsel complain of. The evidence in this case is that at the date of the assessment the complainant owned $6,032,600 par value of the capital stock of the N., C. & St. L. R'y Co., out of a total capitalization of $10,000,000, and elected the directors of the company and controlled its policy. It also appears that, while the complainant was for a while the sole lessee of the Georgia road, yet it had underlet a one-half interest therein to the Atlantic Coast Line. If the whole of this mileage had been allowed, the per cent. to Kentucky would not have been 26, as adopted by the board, but 24.75. Now, the members of the board were asked why they adopted 26 instead of 24.75, and they were unable to satisfactorily answer that question; they simply said that they had adopted it the previous year, and what investigation they then made they could not distinctly remember, but they simply followed their previous decisions to adopt 26 per cent., which was not the per cent. claimed by the complainant, as we have just shown.

It appears that Mr. Harrison, one of the counsel for complainant, insisted with the board that the company was entitled to the full mileage of these two roads and to a per cent. of 24.75, but he says, "the board declined to make the change and give the company the proportion of 24.75 per cent. to Kentucky, which I asked them to do, and, in announcing to me the declination of the board, one member of the board (my present recollection is very clear that it was Treasurer Hager) stated, in the presence of Secretary of State Hill, that the board had paid very little attention to the mileage, but had looked at the matter in all its bearings and from all standpoints, and had concluded that the amount they arrived at was the value of the company's property in Kentucky." (Rec., 122.)

The first proposition, therefore, that ought to be considered in this connection is, was the board bound to adopt the exact percentage of mileage? This will be determined by the statute itself, and if the court will turn to Section 4081, it will see that the statute does not require the board to adopt the exact percentage of mileage; on the contrary, it says that the respective lengths of miles in and out of the State shall be considered in fixing the value of the corporate franchise.

If the court will turn to the original act, shown in the appendix, it will see that the language was as follows: "That proportion of the value of the capital stock which the length of the lines owned, operated, leased or controlled in this State bears to the lines owned, leased or controlled in this State and elsewhere *shall be the value* of the corporate franchise of such corporation liable for taxation in this State." Now, the only change in that law was to insert the words "*considered in fixing* the value," so as to make the statute read "shall be considered in fixing the value," instead of "shall be the value." If any effect at all is to be given to this amendment, there is no avoiding the proposition that it was the intention of the legislature not to bind the board by the exact mileage, but simply recommended to the board that consideration, among a number of others, to be taken into account in arriving at the value of that part of the property of appellee situated in Kentucky. Now, if we turn to Sections 4078 and 4079, quoted in the appendix, it will be seen what a large number of elements of value may be considered, and which may have greater or less influence upon the board in arriving at the value. The board might well have entertained the view, which was presented to it, that, considered from a traffic standpoint, the miles in Kentucky were not more that one-fourth, perhaps not more than one-fifth, as valuable as the

total mileage. Furthermore, the board knew that it had capitalized against the company a number of large items which, under Judge Clark's decision, shown to the members of the board, were of very doubtful propriety. The board had capitalized $125,561.09, which the complainant had been compelled to pay out as rent for one or more of the roads operated by it. This, it is obvious, was an operating expense, an expense absolutely necessary to incur in order to make the return which was reported from that mileage—as much necessary to make it as it was necessary to pay the employes engaged in the operation. The board had also capitalized against the company a number of other items, aggregating a large amount, which, obviously, it should not have done. (See the deposition of Mr. Harrison.) The board also had in mind, doubtless, that in place of taking a period of five years, which, under Judge Grosscup's opinion, they should have taken, it had only taken four years, and by leaving out the fifth year had produced a valuation for Kentucky more than $2,000,000 greater than they would have reached if they had taken five years. Taking all these things into consideration, the board evidently felt it would be pushing the matter too far to haggle about a difference of a small per cent. in the mileage of the road, for if it allowed only that proportion of the Nashville & Chattanooga mileage, which the complainant's holding of the stock bore to the total stock, and allowed only one-half of the Georgia mileage, the highest per cent. which could have been reached would have been 28.03. The appellee was claiming that the real percentage was 24.75, and the board evidently thought it would strike a happy medium and about split the difference. Again, if the board had concluded that we had shown that we were entitled to the total mileage of the Nashville, Chattanooga & St. Louis Railway Company upon the ground of *control*, and had

brought ourselves, therefore, within the meaning of the statute, and then had allowed us only one-half of the mileage of the Georgia road, it would have produced exactly 26 per cent. Under these circumstances, we maintain that the lower court was right in not disturbing the finding of the board on the subject, but, on the contrary, approving it as just and equitable under all the circumstances.

Let us now proceed to a consideration of the construction of the statute involved. What did the legislature mean when it used the word "*control*" as something in addition to, and not embraced by, any of the terms "*leased*, *operated* or *owned*." Is it not true that in popular estimation one company controls another when it holds a majority of its stock, elects its directors and dictates its policy? Is it not generally known that the prime and usually the only cause for one railroad company owning the majority of the stock of another company, is in order to exercise that very control? Such control is never acquired, of course, without a large investment in the securities of the controlled company, and when the legislature came to tax under the franchise statute it sought to reach every interest, and therefore interests in other companies in addition to the company's own property, and it was seen to be a natural and just thing, if the interest in the controlled company was to be subject to taxation, that, when it came to apportion that tax between the States, the mileage of that company should also be considered. In the present case it appears from the deposition of Mr. Harrison that at the date of the assessment the complainant owned over 60 per cent. of the stock; in other words, it owned stock which, he says, is of the value above $6,000,000 at the market price, out of a total issue of $10,000,000. In addition to that, the interest of the complainant company in the Nashville & Chattanooga is mortgaged for a large amount of money. It

is a part security of the unified fours, and Mr. Harrison estimates that at least $5,500,000 rests upon that security, upon which $220,000 of interest is annually paid. This amount was capitalized against the company, and if the company had received a dividend this year, as it has in previous years, that would also have been capitalized against the company, and that being true, it is nothing but just and equitable, as well as in exact conformity to the statute, that that mileage should be considered. Col. Stone, when called upon in oral argument to state what the word "controlled" means as used in the statutes, stated a clear case of operation, and expressed the opinion that, unless the minor road was actually operated by the larger, that it did not come within the meaning of the statute. In other words, he asked this court to interpret that statute exactly as it would have done if the word "controlled" had never been put into the statute. This is entirely contrary to all the canons of construction. The court must give effect to every word where it can be done, and will not expunge from the statute a word as meaningless when an effect can be given to it in accordance with common understanding.

Now, as to the Georgia road, as we have said, that was leased at one time to the complainant, which was the sole lessee and operator, and which is now the lessee, even though a part of the interest is underlet. This mileage comes strictly within the statute requiring the lessee to state the mileage, and there is no statute requiring the lessee to state less than the mileage leased by it. The only argument, so far as we can see, that the counsel for the defendants have interposed against this construction is that it can not be adopted because that would give two roads the right to use the same mileage; but that naturally and necessarily follows from the direction of the statute. For instance, it can not be doubted

that the complainant was bound to give in its Cecilia Branch mileage, because it owned the road absolutely. No more can it be doubted that the Illinois Central was required to give in the same mileage, because it both leased and operated it. The same is true of the Clarksville & Princeton Division and other roads heretofore mentioned. It is also true of the Louisville & Nashville division from Lexington to Louisville, which mileage is given in both by the Louisville & Nashville Railroad Company and the Chesapeake & Ohio Railroad Company. It is also true of the Illinois Central's road from Louisville to West Point, which is used by it and also by the Louisville, Henderson & St. Louis Railway Company. The same is true of the Georgia road. The fact that the road is jointly operated by the Atlantic Coast Line and the Louisville & Nashville Railroad does not keep each of them from being a lessee and each of them from operating it, and under the statute we were entitled to that whole mileage; and, as we have said, as the Louisville & Nashville Railroad Company owns a majority of the stock of the Nashville & Chattanooga Railway Company, elects its directors and controls its policy and obtained that stock for the very purpose of securing that control, it is a case which comes within the statute, and we are entitled to the whole mileage, and the fact that the Nashville & Chattanooga Railroad Company is bound to report the same mileage as road operated is not in the least different from the case of the Cecilia Branch and other instances above mentioned, and this argument against the use of that mileage is, therefore, of no value.

We have heretofore shown that the statute does not require the Board of Valuation and Assessment to accept as binding and conclusive upon it the precise percentage of mileage, but simply requires the members to consider that fact along with all of the other facts particularly set out in

Sections 4078 and 4079. We now desire to call the court's attention to the fact that it has never been the practical construction of that statute, placed upon it by the board called upon to execute the statute, that it was required to look to and be governed by the precise percentage of mileage. This is clearly shown by the deposition of each member of the board, Mr. Coulter, Mr. Hager and Mr. Hill, who show the various methods of assessment and show that sometimes the actual assessment is made arbitrarily, upon no particular method.

As to the effect of practical construction by those whose duty it is to execute a statute, see Harrison vs. Commonwealth, 83 Ky. 163; City of Louisville vs. Barbour, 83 Ky. 95; Clarks Run vs. Commonwealth, 96 Ky. 532; City vs. Garr, 97 Ky. 588.

As to the meaning of the word "controlled," we quote from the case United States vs. Northern Securities Co., 120 Fed. 721, as follows:

> "It will not do to say that so long as each railroad "company has its own board of directors they operate "independently, and are not controlled by the owner of "the majority of their stock. It is the common experi- "ence of mankind that the acts of corporations are dictated "and their policy is controlled by those who own the "majority of their stock. Indeed, one of the favorite "methods in these days, and about the only method, of "obtaining control of a corporation, is to purchase the "greater part of its stock. It was the method pursued by "the Northern Pacific and Great Northern Companies to "obtain control of the Chicago, Burlington & Quincy rail- "roads; and so long as directors are chosen by stockhold- "ers, the latter will necessarily dominate the former, and "in a real sense determine all important corporate acts.

"The fact that the ownership of a majority of the capital "stock of a corporation gives one the mastery and control "of the corporation was distinctly recognized and declared "in Pearsall vs. Great Northern Railway, 161 U. S. 646, "16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has "been recognized and declared by other courts. Pennsyl- "vania R. Co. vs. Commonwealth (Pa.), 7 Atl. 368, "371; Farmers Loan & Trust Co. vs. New York & North- "ern Railway Co., 150 N. Y. 410, 425, 44 N. E. 1043, 34 "L. R. A. 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In "opposition to this view counsel cite Pullman Car Co. vs. "Missouri Pacific Co., 115 U. S. 587, 596, 6 Sup. Ct. 194, "29 L. Ed. 499, but in that case the meaning of the word "'controlled' as used in private contract, was the point "under consideration, and what was said on the subject "can not be held applicable to cases arising under the "anti-trust act, when the point involved is whether the "ownership of all the stock of two competing and parallel "railroads vest the owner thereof with the power to sup- "press competition between such roads. We entertain no "doubt that it does. Indeed, we regard the suppression of "competition, and to that extent a restraint of commerce, "as the natural and inevitable result of such ownership."

4. It is next insisted by counsel that the Board of Valuation and Assessment assessed the property of the appellee at less than its real value. It surely could not be contended by the appellee that they were guilty of fraud or wrong doing, in making the assessment, and is not so contended. On the contrary they say that they in good faith endeavored to assess the property at its full and fair cash value. We submit that under these circumstances the cases of P., C., C., etc., R. Co. vs. Backus, 154 U. S. 434, Western Union Telegraph Co. vs. Taggart, 163 U. S. 1, and Adams Express Co. vs. Ohio 165 U.

S. 229 are conclusive. The court in the last case said: "The general rule is well settled that whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts, it can not be overthrown by evidence going only to show that the fact was otherwise than was found and determined." On this branch of the case we do not feel justified in going into the evidence in detail for the purpose of showing that the valuation of the appellee's property fixed by the Board of Valuation and Assessment was a full value. However, that question is fully discussed by the lower court in its opinion. (Rec., 811 to 814.) The appellants in attacking their own valuation of the property occupy a very different position from that occupied by the appellee, which attacks the action of the local assessors and the Board of Equalization. The effect of the charge of the appellee against the local assessing officers and the Board of Equalization is that the habitual and intentional undervaluation of the property is contrary to their sworn duty under the law, and a legal fraud. But surely the appellees can not maintain that position, and do not assert that position as against themselves.

In conclusion, we respectfully submit to the court:

1. That the Federal court had jurisdiction—

(*a*) Because the amount involved exceeded, exclusive of interest and cost, $2,000.

(*b*) Because the Federal question, viz., the right to protection under the Fourteenth Amendment, guaranteeing the equal protection of the laws, is distinctly raised.

2. That there is jurisdiction in equity—

(*a*) Because as to the counties, cities and taxing districts there would, except as the injunction should go, be danger of a great multiplicity of suits, and this suit is, therefore, in order to avoid that multiplicity of suits.

(*b*) So far as the State's claim is concerned, the equity lies in the necessity for preventing the money going into the treasury of the State until after the adjudication. The money could not be paid under protest and recovered back because the citizen may not sue the State without its consent. A further ground of equity, so far as the State is concerned, is to avoid the imposition of heavy penalties provided by the statute, among which is a penalty of $50 a day for the failure to pay after the tax becomes due.

3. That the property of the appellee was fully assessed.

(*a*) This is shown conclusively by the evidence, a very good review of which will be found in the court's opinion, and it is conclusively presumed to be true in the absence of any allegation of fraud or mistake upon the part of the appellants in making the assessment, and no such allegations have been made.

4. That the great mass of property in the State, indeed all of the property assessed by the local assessors and equalized by the Board of Equalization, amounting to 77 per cent. of the whole, was habitually, systematically and intentionally undervalued to at least 20 per cent., and that, under these circumstances, the appellee and the corporations which are required by law to be assessed by the Board of Valuation and Assessment will, unless relieved, be required to pay proportionately one-fifth more of the burdens of government than the mass of property in the State, and that to require this would be to deny to the appellee the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

Respectfully submitted,

JAMES P. HELM,

HELM BRUCE,

For the Appellee.

APPENDIX.

Assessment of Certain Corporations by Board of Valuation and Assessment.

SECTION 4077. Franchise taxed—Board of Valuation to determine where tax shall be paid. Every railroad company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section Four Thousand and Ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, *and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment*, and for the discharge of such other duties as may be imposed on them by this act.

The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

SEC. 4078. Franchise—Reports by corporations to determine value. In order to determine the value of the franchises, mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by Section Four Thousand and Ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

SEC. 4079. Franchise—Reports if lines extend beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: Provided, that said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

SEC. 4081. Franchise of carrier, when taxed in each district through which line passes. If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the State, *less the value of any tangible property assessed or liable to assessment, in any such county, city, town or taxing district.*

SEC. 4083. Notice to corporations of value of franchise board may change. It shall be the duty of the auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summon and swear witnesses, and after hearing such evidence the board may change the valuation as it may deem proper, and the action of the board shall be final.

SEC. 4084. Value of franchise to be reported to counties entitled to tax. The auditor shall, at the expiration of thirty days after the final determination of such values, cer-

tify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk, filed in his office , and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

SEC. 4091. Taxes of corporations and similar concerns—except banks and trust companies—when due—penalties. All State taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer, whose duty it is to collect the same, and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

Original Section 4081 in the respect indicated by the following quotation was different from present section:

"That proportion of the value of the capital stock "which the length of the lines operated, owned, leased,

"or controlled in this State bears to the lines owned, "leased or controlled in this State, and elsewhere, *shall* "*be the value of* the corporate franchise of such corpo- "ration liable for taxation in this State."

State Board of Equalization.

SEC. 4268. Appointment—term of office—number of members—quorum. That it shall be the duty of the governor, by the advice and with the consent of the senate, to appoint one person, having the qualification of an elector, from each appellate district in this State, and they, together with the Auditor of Public Accounts, who shall be an *ex officio* member without additional compensation, shall constitute a State Board of Equalization of assessments. The members of this board shall hold their office for the period of two years, and until their successors are appointed and qualified. The term of office of such persons, to be appointed as aforesaid, shall begin on the first day of November, 1888. A majority of such board shall constitute a quorum to do business.

SEC. 4269. Oath to be taken. Each member of said board, before entering upon the duties of said office, shall take the oath or affirmation prescribed by the Constitution of the State.

SEC. 4270. Organization of board—Compensation of members and secretaries. At the first meeting of said board, it shall organize by selecting one of its members as chairman and appointing a secretary, who shall take the oath prescribed by the Constitution. Each member of said board shall receive for his services the sum of five dollars per day during its sessions, and ten cents per mile for each mile necessarily traveled in going to and returning from the seat of government, to be computed by the Auditor of Public Accounts, and no other allowance or emolument, directly or indirectly,

except the sum of ten dollars annually, which shall be in full for postage, stationery, newspapers and all other incidentals. The pay and mileage allowed to each member of said board, and the pay allowed to its secretaries and employes, shall be certified by the chairman. Said board may employ three secretaries at five dollars per day.

SEC. 4271. Time and place of meeting—duty of librarian. Said board shall assemble at the State capital on the tenth day of February, annually, to perform the duties imposed upon it by the provisions of this act; but in case the auditor has not, by that date, received sufficient returns of assessments and tabulated statements, as provided for in this act, from the various county clerks of this Commonwealth, the said officer may, at his discretion, call the board to meet at some later day. The State librarian shall furnish such printing, fuel, lights and rooms as may be necessary for the transaction of the business of said board.

SEC. 4272. Authority of board when only partial returns or reports have been made. In all cases of partial return from any county the Board of Equalization may estimate the valuation in the towns or districts from which returns have not been received, and may equalize the total valuation as in other cases; and in all cases of failure on the part of any county clerk to furnish the proper returns of the assessment of his county to the auditor prior to or during the meeting of the Board of Equalization in each year, said board may, by order, authorize the auditor to equalize the assessment of such county when the full returns have been received by him.

SEC. 4273. County Clerks—statements to be made and returned by—fee—penalty. That the clerks of the various county courts of this Commonwealth are hereby required to make out an annual tabulated statement of all sales

of real estate, as shown by the deed books in their repective counties, on suitable blanks, which the auditor is hereby required to furnish said clerks, and said clerks are required to make and file said tabulated statements on or before the first day of January in each year, town lots being kept separate from other real estate; said tabulated statements shall be for one year immediatly preceding the fifteenth day of September, and shall contain a list of all sales of real estate, town lots being kept separate as aforesaid, the price paid, with terms and conditions, the number of acres, and the assessed value of same for the said year. Said tabulated statements shall only include sales where absolute fee simple title is given, and if only a part of a tract of land or town lot is sold, shall give a short description of same, and state what proportion the same may be of such tract of land or town lot. The said tabulated statement shall be sworn to by the said clerk before some person competent to take oaths as a full and complete statement of said facts for the period of one year previous to the fifteenth day of September. Said statement shall also be signed and sworn to by the county attorney and county judge, and in their affidavits they shall state that they have examined the recorded and unrecorded conveyances filed for said twelve months preceding September the fifteenth last past and each and every such conveyance (except those based on love and affection) with the consideration therefor correctly stated as shown in said statement, and that the assessed values are correctly given in said statement. Said board shall have the authority to obtain and use any other evidences as to values, and whether or not the property conveyed has been assessed at a greater per centum of its actual value than in cases where property has not been conveyed. Said tabulated list shall be made out and sent to the Auditor of Public Accounts for the use of the State Board of

Equalization. For his services in making said tabulated statement the clerk shall be paid a reasonable compensation by the county court of his respective county. If any clerk of any county in this Commonwealth fails to make out and send, by mail or otherwise, to the Auditor of Public Accounts, on or before the first day of February in each year, the tabulated list of sales, as provided in this act, he shall be fined not less than fifty nor more than two hundred dollars, upon indictment in any court of competent jurisdiction in this Commonwealth.

SEC. 4274. Percentage of value to be fixed on real property—report to county judges—witnesses. The said Board of Equalization shall fix the percentage of assessed value of real property at seventy per centum of cash value, and all counties whose average lists of real property are below such per centum shall be raised to the same, and all those counties whose average lists are above the same shall be lowered to said standard. The secretary of the State Board of Equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear, under oath, before said board in reference to the action of the board. The board shall then revise their action, or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts.

SEC. 4275. Percentage of value to be fixed on personal property. The said Board of Equalization shall also equalize the personal property of every county in this Commonwealth, by adding to or subtracting from the list of personal property,

as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum fractions less than one-half shall be rejected and fractions of one-half and over shall be counted as one.

SEC. 4276. Assessment when to remain as fixed by the county boards. In the event that there has not been as many as five sales of land in any county in any one year next preceding September the fifteenth, then the assessments of real estate and personal property for that county shall remain as fixed by the county board of supervisors, and the same rule shall apply to town lots.

SEC. 4277. Percentage of values—how ascertained. Said board shall find the average percentage of assessed value to cash value of lands and town lots in any one county by taking in said tabulated statement the aggregate assessed values of all tracts of land and town lots, town lots being kept separate, and calculating what percentage said aggregate assessed values are of the cash value of the same, time payments being reduced to cash value on the basis of six per centum discount.

SEC. 4278. Result to be reported to Auditor—duty of. When the said board shall have completed its equalization of assessments for any one year, the chairman and secretary shall certify to the auditor the rate finally determined by the said board to be added to or deducted from the listed or assessed valuation of land and town lots and personal property in the several counties, and the amounts assessed by said board, and it shall be the duty of the auditor, under his seal of office, to report the action of the board to the several sheriffs immediately after the adjournment of said board.

SEC. 4279. Proceedings to be published—distribution. A report of the proceedings of said Board of Equalization shall

be published annually in pamphlet form, and one thousand copies thereof printed, of which number each member shall be entitled to fifty copies, the auditor to two hundred, and the remainder thereof shall be distributed by the Secretary of State to the several counties in proportion. Said distribution shall be made by mail or express, immediately upon the receipt of said report from the public printer, the cost of such distribution to be paid by the Treasurer of the State out of any money in the treasury not otherwise appropriated.

SEC. 4280. Secretaries' duties—fractions may be rejected. All rates of taxes, as hereinafter provided for, shall be extended by the secretaries on the assessed valuation of property as equalized and assessed by the State Board of Equalization. Said secretaries shall extend the rates of addition or deduction ordered by the State Board of Equalization in columns provided for that purpose. The rates per cent. ordered by the State Board of Equalization shall be extended on the assessed valuation of property as corrected and equalized by the county board. In all cases of extension of valuations, where the equalized valuation shall happen to be fractional, the clerk shall reject all such fractions as may fall below fifty cents; fractions of fifty cents or more shall be extended as one dollar.

SEC. 4281. Auditor—duties of. It shall be the duty of the auditor to make in each asssessor's book a certificate of the rate of deduction or addition determined by the State Board of Equalization in the county to which such books shall pertain. The auditor shall make out, over his hand an official seal, a certificate of the action of the Board of Equalization, which shall be transmitted to the county clerk, and by him affixed to the assessor's book for the said year, and shall be the warrant of authority to the sheriff or collector for the collection of taxes as therein set forth.

Certain Sections of Original Act Providing For Equalization, Approved May 10, 1884.

SEC. 5. It shall be the duty of the secretary of said board under the direction of the Auditor of Public Accounts, to compile the assessments received from the county clerks into tabular statements, convenient for the use of the board; which statements shall be submitted to the board on the first day of its session in each year, or as soon thereafter as the board is organized. The secretary shall perform such duties in vacation as shall be assigned to him by the board.

SEC. 6. Said board shall assemble at the State Capital on the tenth day of June, annually, and examine the assessments of property assessed for taxation in the several counties of this State, as returned to the auditor, and shall equalize the assessments as hereinafter provided; but said board shall not reduce the aggregate assessed valuation in the State; neither shall it increase said aggregate valuation, except in such an amount as may be reasonably necessary to a just equalization.

SEC. 7. Said board, in equalizing the valuation of property as listed and assessed in different counties, shall consider the following classes of property separately, viz., personal property, lands and town and city lots; and upon such consideration, determine such rates of addition to or deduction from the listed or assessed valuation of each of said classes of property in each county, or to or from the aggregate assessed value of each of said classes in the State, as may be deemed by the board to be equitable and just—such rates being in all cases even.

SEC. 8. In equalizing the value of personal property between the several counties, said board shall obtain from the aggregate footings of the number and value of each; and the

value of the several kinds of enumerated property in each county shall be obtained at those values; and the value of enumerated property thus obtained, as compared with the assessed value of such property in each county, shall be taken by said board to obtain a rate per cent. to be added to or deducted from the total assessed value of personal property in each county; Provided, that whenever, in the opinion of the board, it is necessary to a more just and equitable equalization of personal property, that a rate per cent. be added to or deducted from the value thus obtained in any one or more of the counties, said board shall have the right so to do; but the rate per cent. hereinbefore required shall first be obtained to form the basis upon which the equalization of personal property shall be made.

SEC. 9. Lands shall be equalized by adding to the aggregate assessed value thereof, in every county in which said board may believe the valuation to be too low, such rate per centum as will raise the same to its proper proportionate value, and by deducting from the aggregate assessed value thereof, in every county in which said board may believe the valuation to be too high, such per centum as will reduce the same to its proper value. Town and city lots shall be equalized in the same manner herein provided for equalizing lands, and, at the option of said board, may be combined and equalized with lands.

SEC. 10. When said board shall have separately considered the several classes of property as hereinbefore required, the result shall be combined into one table, and the same shall be examined, compared, and perfected, in such manner as said board shall deem best to accomplish a just equalization of assessments throughout the State, preserving, however, the principle of separate rates for each class of property.

SEC. 11. In all cases of partial return from any county, the Board of Equalization may estimate the valuation in the

towns or districts from which returns have not been received, and may equalize the total valuation as in other cases. And in all cases of failure on the part of any county clerk to furnish the proper returns of the assessment of his county to the auditor prior to or during the meeting of the Board of Equalization in each year, said board may, by order, authorize the auditor to equalize the assessment of such county when full returns have been received by him.

SEC. 12. When said board shall have completed its equalization of assessments for any year, the chairman and secretary shall certify to the auditor the rates finally determined by said board to be added to or deducted from the listed or assessed valuation of each class of property in the several counties, and also the amounts assessed by said board; and it shall be the duty of said auditor, under his seal of office, to report the action of the board to the several sheriffs immediately after the adjournment of said board.

SEC. 15. All rates for taxes, hereinafter provided for, shall be extended by said secretaries on the assessed valuation of property, as equalized and assessed by the State Board of Equalization.

SEC. 16. Said secretaries shall extend the rates of addition or deduction ordered by the State Board of Equalization in columns provided for that purpose. The rates per cent. ordered by the State Board of Equalization shall be extended on the assessed valuation of property, as corrected and equalized by the county board; said rates shall be extended on the listed valuations of such designated property. In all cases of extension of valuations where the equalized valuation shall happen to be fractional, the clerk shall reject all such fractions as may fall below fifty cents; fractions of fifty cents or more shall be extended as one dollar.

SEC. 17. It shall be the duty of the auditor to make, in each assessor's book, a certificate of the rate of deduction or

addition determined by the State Board of Equalization in the county to which such books shall pertain.

SEC. 18. The auditor shall make out, over his hand and official seal, a certificate of the action of the Board of Equalization, which shall be transmitted to the county clerk, and by him affixed to the assessor's book for the said year, and shall be the warrant of authority to the sheriff or collector for the collection of taxes, as therein set forth.

Report to be Made to R. R. Commission.

SEC. 4096. Reports by to auditor—penalty for failure to make. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad lying in whole or in part in this State, shall, on or before the first of September in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of said company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears

to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of September shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of September that he fails to file said report, to be recovered as indicated by Section 4104 of this article.